85-1708

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

LIST OF PARTIES

The appellants are the State of California; Riverside County, California; and Ben Clark, Sheriff of Riverside County.

The appellees are the Cabazon Band of Mission Indians and the Morongo Band of Mission Indians.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The U.S. Court of Appeals filed an original opinion, reported at 783 F.2d 900, and subsequently, on its own motion, filed an amended opinion that is reprinted at Appendix 1-11. The district court did not issue a written opinion, findings of fact, or conclusions of law. The order, judgment, and two notices of entry of the district court are set forth at Appendixes 12-15, 16-18, 19, and 20, respectively.

JURISDICTIONAL GROUNDS

This action challenges the validity of State and local laws prohibiting commercial gambling as applied on Indian reservations. The federal courts have jurisdiction under 28 U.S.C. §1331.

The original decision of the U.S. Court of Appeals for the Ninth Circuit was filed and entered on February 25, 1986, and the amended opinion was filed and entered on April 8, 1986. App. 1. No petition for rehearing was filed. The notice of appeal was filed in the Court of Appeals on April 14, 1986. App. 21-22.

This appeal is filed under 28 U.S.C. § 1254(2). See *Dutton v. Evans*, 400 U.S. 74 (1970); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); cf. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960.

APPLICABLE FEDERAL LAWS

Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360, is set forth at Appendix 23-25. The Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, is set forth at Appendix 25-26.

STATEMENT OF THE CASE

1. Nature of the Controversy

The Cabazon Tribe and Morongo Tribe conduct high stakes bingo games on their reservations, both of which are located in Riverside County, California. The games are operated by non-Indian professional operators, who receive a percentage of the profits. App. 2. The federal government does not regulate, supervise, or monitor the games. The games are authorized by tribal ordinance, but the Morongo ordinance has not been federally approved. The games, according to the Ninth Circuit, "are played predominantly by non-Indian participants." *Id.*

California law prohibits lotteries except where authorized by law. Cal. Pen. Code § 320. Under California law, charitable organizations may operate bingo games for charitable purposes; the games must be operated by members of the charitable organization; and jackpots cannot exceed $250. *Id.* at 326.5. The tribal bingo games violate all these provisions. App. 2. Indeed, the tribal jackpots greatly exceed $250, for the jackpots include cars, pickups, boats, and cash awards of thousands of dollars.[1]

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[1] A State investigator, visiting the Cabazon bingo parlor one night in 1984, observed that the prizes included: a 1984 Dodge pickup and All

The Cabazon Tribe also conducts three card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. The card parlor games violate a Riverside County ordinance. App. 2.

2. The Proceedings Below

The Tribes brought consolidated actions for injunctive and declaratory relief and for damages against Riverside County, alleging that State and County laws prohibiting commercial gambling cannot be applied to the tribal bingo and card parlor games. The State of California intervened. In response to cross-motions for summary judgment, the district court granted the Tribes' motion and denied the State and County's motion, ruling that State and County gambling laws are inapplicable to the tribal operations. The district court issued final judgment under Rule 54(b) of the Federal Rules of Civil Procedure; issued a permanent injunction restraining the State and County from applying their gambling laws on the reservations; and retained jurisdiction to consider the damages issue. App. 12-20.[2] The State and County appealed.

On appeal, the Ninth Circuit affirmed the lower decision, ruling that State and County gambling laws cannot be applied on Indian reservations. App. 1-11. The court reasoned that such application is not authorized by the "federal common law," as applied by this Court in *Rice v. Rehner*, 463 U.S. 713 (1983). According to the court, Indian tribes have an "inherent sover-

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Terrain vehicle; a Sylvan Bass boat valued at $6,771; a do-it-yourself jackpot of $2,250; a Bonanza Bingo jackpot of $6,300; and regular jackpots of $150, with a super jackpot of $750 for four games. Cal. Exh. 17, at pp. 3-5. Approximately 300 people were playing the bingo games, most of whom were non-Indians. *Id.* at p. 6.

The Morongo Bingo games have advertised: "High Stakes; Over $20,000 nightly; more than $5,000,000 in 1983; $15,000.00 Jackpot Must Go Every Saturday Night in January; 1984 Auto-Every Sunday Must go; Matinee Every Saturday During January; Mystery Door Prize Every Night in January." Salter Dec., Exh. B.

[2] On stipulation, the district court subsequently dismissed the Morongo damages claim.

eign" right to conduct gambling operations patronized by non-Indians, and the tribal interest in raising revenue outweighs the State and County's regulatory interests. App. 10-11. The court also ruled that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and the Organized Crime Control Act, 18 U.S.C. § 1955, do not authorize application of State and County gambling laws on Indian reservations. App. 3-6. The court's decision applies both to the State bingo statutes and the County card parlor ordinance. App. 2 n. 1.

REASONS FOR GRANTING PLENARY REVIEW

I

THIS CASE RAISES A SIGNIFICANT FEDERAL QUESTION OF NATIONAL IMPORTANCE, AND A CONFLICT EXISTS AMONG LOWER COURTS CONCERNING THE QUESTION

This case raises the question whether state and local gambling laws apply on Indian reservations, a question never decided by this Court. The question has gained national significance and attention, as Indian tribes in California and elsewhere are conducting high stakes bingo games to generate huge tribal revenues. The bingo games are lucrative because they attract non-Indians who cannot lawfully play high stakes bingo elsewhere in the state. The games provide opportunities for organized criminal intrusion, because they involve high stakes and are not regulated by the federal government.

Tribal bingo operations are proliferating in California and nationally. As of mid-1985, at least 100 tribal bingo operations were in effect in 19 states, and the number has increased since then.[3] At least 26 such operations are now in effect in California

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[3] The U.S. Department of the Interior has informally advised the California Attorney General's office that, according to a Department survey conducted in 1985, at least 100 tribal bingo operations were in effect in 19 states at that time. The Indian tribes conducting the bingo games are listed at Appendix 27-29. The Department also advised that many tribal bingo operations have been initiated since the survey was

alone. See note 3, *supra*. The proliferation has occurred because of recent Fifth and Ninth Circuit decisions holding that State and local gambling laws do not apply to tribal bingo operations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). The Fifth and Ninth Circuit decisions, as will be explained below, conflict with recent decisions of the Maine Supreme Judicial Court and the Oklahoma Supreme Court holding that state and local gambling laws *apply* to tribal bingo operations. See *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. Sup. Jud. Ct.), *appeal dismissed*, 464 U.S. 923 (1983); *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. Sup. Ct. 1985); see pages 14-15, *infra*. Thus, a conflict exists among lower courts concerning the issue here.

This Court should grant review both to resolve the conflict among lower courts, and because the case presents "an important question of federal law which has not been, but should be, settled by this Court." Rule 17.1(c), Rules of the Supreme Court.

II

THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT INDIAN TRIBES DO NOT HAVE A SOVEREIGN RIGHT TO MARKET PRODUCTS TO NON-INDIANS IN VIOLATION OF STATE LAW

The Ninth Circuit held that Indian tribes have a sovereign right to conduct commercial gambling operations patronized by non-Indians. App. 11. The Ninth Circuit decision conflicts with this Court's recent decisions in *Rice v. Rehner*, 463 U.S. 713 (1983), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), which hold that Indian tribes do *not*

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completed. The gross and net revenues generated by the tribal operations are unknown because the games are not regulated.

In California, 10 tribal bingo operations were in effect when the instant case was submitted to the district court, but the figure has since risen to 26. App. 29.

have a sovereign right to market products to non-Indians in violation of state law.

In *Rice* and *Colville*, this Court followed the general rule that state laws apply on Indian reservations unless preempted by federal law or inconsistent with tribal self-government. *Rice*, 463 U.S. at 718; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). This rule requires a balancing of state, federal, and tribal interests. *Rice*, 463 U.S. at 718-720; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (the question requires a "particularized inquiry" into the "nature of state, federal, and tribal interests at stake"). Under the balancing test, the tribal interest is strongest, and the State interest weakest, if a sovereign tribal "tradition" exists under the particular circumstances. *Rice*, 463 U.S. at 719. Coversely, the state interest is strongest if the tribal activity involves non-Indians. *Id.* at 720 n. 7; *Colville*, 447 U.S. at 151, & n. 27, 161. The balancing test applied in *Rice* and *Colville* is apparently a form of federal common law, in that it is a judicial doctrine rather than a constitutional or statutory one.

Applying the balancing test in *Rice*, this Court upheld California's right to regulate liquor sales by federally-licensed Indian traders to non-Indians on a reservation. The Court, reversing the Ninth Circuit, reasoned that Indian tribes have not "traditionally" regulated liquor sales to non-Indians, and therefore the State's regulatory interest outweighs the tribal interest. *Rice*, 463 U.S. at 720-725. In *Colville*, this Court upheld the State of Washington's right to tax cigarette sales by Indian retailers to non-Indians on a reservation. The Court reasoned that the Indian sellers were attempting to "market an exemption" from State laws to non-Indian purchasers, and that the "market existed in the first place only because of a claimed exemption from these very [state] taxes." *Colville*, 447 U.S. at 155, 157. The Court stated in both cases that state "regulation of sales to non-Indians . . . simply does not 'contravene the principle of tribal self-government' " because Indian tribes "have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Rice*, 463 U.S. at 721 n. 7, quoting from *Colville*, 447 U.S. at 151, & n. 27. In *Colville*, this Court specifically rejected the tribe's "economic argument" that it has a right to raise revenue by selling products

to non-Indians. *Colville*, 447 U.S. at 154. As one commentator has observed, *Colville* suggests that this Court "may be willing to limit the immunity given to Indian tribes when they act commercially." Note, "In Defense of Tribal Sovereign Immunity," 95 *Harv. L. Rev.* 1058, 1068 (1982).

The Ninth Circuit, however, held that State and local gambling laws do not apply on Indian reservations because Indian tribes have a sovereign right to conduct gambling operations patronized by non-Indians. App. 10-11. The court ruled that State and local laws are not preempted by federal law, but instead infringe on tribal sovereignty. *Id.* at 7. The sovereignty issue, the court held, turns *not* on whether Indian tribes have "historically engaged in a particular activity," but on whether the tribes are "engaged in a traditional governmental function." *Id.* at 11. The Tribes here, according to the court, are "engaged in the traditional governmental function of raising revenue." *Id.* The tribal interest in raising revenue, the court stated, "outweighs the State's interest in protecting against the *potential* for intrusion of organized crime," *id.* at 10 (emphasis in the original), although the court recognized the State interest as "legitimate" and "commendable." *Id.* at 8.

The conflict between the Ninth Circuit decision and *Rice* and *Colville* is obvious and direct. In *Rice* and *Colville*, this Court held that Indian tribes do not have a sovereign right to market products to non-Indians, and that tribal economic interests do not outweigh legitimate state interests. The Ninth Circuit, however, held that Indian tribes have a sovereign right to market a gambling product to non-Indians, because tribal economic interests outweigh even "legitimate" state interests. App. 8, 10-11. *Colville* holds that Indian tribes cannot "market an exemption" from state laws to non-Indians, particularly where the market exists because of state restrictions against non-Indians. *Colville*, 447 U.S. at 155. The Ninth Circuit, however, held that Indian tribes can market exemptions from state gambling laws to non-Indians, even where the market exists because the state prohibits gambling. Under the Ninth Circuit decision, Indian tribes can take commercial advantage of state gambling prohibitions by

marketing to non-Indians the very product that is prohibited. This result conflicts with both *Rice* and *Colville*.[4]

Indeed, the conflict between *Rice* and *Colville* and the Ninth Circuit decision concerns the fundamental question—vital to the essence of tribal sovereignty—whether the tribal sovereign "tradition" is measured by the tribal activity or by tribal economic interests. In *Rice*, this Court measured the tradition in terms of the *activity*; the question was whether Indian tribes have traditionally regulated liquor sales to non-Indians. The Ninth Circuit, however, held that the tribal "activity" is irrelevant, and focused instead on tribal economic interests. App. 11. In effect, the Ninth Circuit defined tribal sovereignty in purely economic terms, failing to consider whether commercial gambling is a traditional form of tribal activity. Under the Ninth Circuit analysis, Indian tribes would have a sovereign right to market any commodity or contraband to non-Indians as long as the marketing is profitable, no matter how much such marketing is outside the tribal tradition or illicit under state law. This result expands the concept of tribal sovereignty beyond its legitimate scope, and is not consistent with the "accommodation" of state, federal, and tribal interests that is the essence of modern federal Indian law. See *Rice*, 463 U.S. at 719, quoting from *Colville*, 447 U.S. at 156.

By expanding tribal sovereignty under an economic analysis, the Ninth Circuit has departed from the modern "trend" of

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[4] The Ninth Circuit distinguished *Rice* on the ground that *Rice* involved a federal statute—18 U.S.C. § 1161—not relevant here. App. 5 n. 4. Although the cases are different in that respect, *Rice* primarily focused on the tribal tradition, not the federal statute. *Rice*, 463 U.S. at 720-725. Moreover, as explained later, the Organized Crime Control Act authorizes the application of state gambling laws on Indian reservations, and this federal enactment expresses federal policy here as clearly as section 1611 expressed federal policy in *Rice*. See page 16, *infra*.

The Ninth Circuit distinguished *Colville* on the ground that the Tribes here are giving "value" to non-Indians, unlike the situation in *Colville*. App. 13. Although the cases are different in that respect, *Colville* primarily held that Indian tribes cannot "market an exemption" from state laws to non-Indians where the market is created by state restrictions against non-Indians. *Colville*, 447 U.S. at 155.

federal Indian law, under which federal preemption rather than tribal sovereignty is the focal point in determining state jurisdiction over Indian reservations. See *Rice*, 463 U.S. at 718; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). Under this trend, tribal sovereignty is a "backdrop" for the preemption analysis. *Id.* The Ninth Circuit, however, specifically held that federal law does not preempt state law, and instead rested its decision on tribal sovereignty grounds. App. 7. The absence of federal preemption distinguishes this case from modern Indian law cases where this Court has invoked federal preemption in striking down state laws as applied on Indian reservations. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. 136; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *McClanahan v. Arizona State Tax Comm'n*, *supra*, 411 U.S. 164. Indeed, the absence of federal preemption, coupled with the fact that the tribal activity involves non-Indian patrons, strongly supports the application of State and local laws here. The Ninth Circuit, by holding that tribal sovereignty is an absolute bar rather than a backdrop, even where federal preemption does not apply and where non-Indians are involved, carries tribal sovereignty beyond limits ever recognized by this Court.

The tribal gambling operations involved here are not consistent with the tribal "tradition," as the tradition is measured by the activity itself. Indian tribes have not traditionally conducted high stakes gambling operations that solicit and depend on non-Indian patronage, particularly where the games are successful because they are illegal under state law. The tribal economic base has never depended on large scale gambling operations, conducted in buildings erected specially for that purpose. The Ninth Circuit, by focusing on economic interests rather than activity, would allow Indian reservations to become gambling enclaves for non-Indians who wish to avoid state gambling laws, and would encourage Indians themselves to become a class of professional gambling entrepreneurs. This result sharply departs from the historic purpose of the reservation system, which was to allow Indian tribes to maintain their traditional culture by setting them apart from surrounding non-Indian communities.

California's interest in prohibiting tribal high stakes bingo, as relevant under the *Rice* balancing test, arises not only because the bingo games take commercial advantage of California gambling prohibitions against non-Indians, but also because, as explained more fully below, the games create risks of organized criminal infiltration. See pages 17-18, *infra*. The Ninth Circuit held that the State interest, although "legitimate" and "commendable," is "weak" because the case involves "only Indians," in that California regulates the Indian operators rather than the non-Indian participants. App. 8. The incident of State regulation, however, does not determine whether the tribal activity involves "only Indians." The tribal activity here involves non-Indians because, although the State regulates operators, the tribal games solicit and depend on non-Indian patronage. In *Rice*, this Court upheld a State regulation whose incident applied to Indian sellers rather than non-Indian buyers. Moreover, since the tribal games are operated by non-Indians, App. 2, the immediate incident of State regulation falls on non-Indians in any event.

Moreover, the incident of State regulation is not relevant to the State's interest in preventing criminal infiltration. Organized crime is not less likely to gain control because the State regulates operators rather than participants. Indeed, the opposite is true, for California can better prevent criminal infiltration by regulating the operators, who reap the profits.

For the foregoing reasons, the Ninth Circuit decision conflicts with *Rice* and *Colville*. This Court should grant review because the lower decision "has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17.1(c), Rules of the Supreme Court.

III

THE NINTH CIRCUIT DECISION CONFLICTS WITH RECENT STATE COURT DECISIONS HOLDING THAT STATE GAMBLING LAWS APPLY ON INDIAN RESERVATIONS

Prior to the Ninth Circuit decision, only two appellate courts—the Maine Supreme Judicial Court and the Oklahoma

Supreme Court—applied the balancing test in determining whether state gambling laws apply on Indian reservations. See *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me. Sup. Jud. Ct.), *appeal dismissed*, 464 U.S. 923 (1983); *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. Sup. Ct. 1985). Both appellate courts, relying on *Colville*, concluded that the balancing test supports the application of state gambling laws on Indian reservations. The Ninth Circuit decision conflicts with both decisions. This Court should review the lower decision here because it decides a "federal question in a way in conflict with a state court of last resort." Rule 17.1(c), Rules of the Supreme Court.[5]

In *Penobscot*, the Maine Supreme Judicial Court held that Maine can lawfully prohibit Indian commercial bingo operations partonized by non-Indians. The Court, citing *Colville*, applied the balancing test, described as "federal Indian common law." 461 A.2d at 482-487. Under the balancing test, the Court reasoned that the State has a "legitimate governmental interest" in prohibiting tribal bingo; that the tribal interest is "purely financial;" that the Tribe would have "nothing to 'sell' " if the State did not prohibit commercial bingo; and that the Tribe was attempting to "market an exemption" from State laws to non-Indians. *Id.* at 485. The Court also reasoned that commercial bingo has played no part in the Tribe's "historical culture and development," is "not uniquely Indian in character," and is "not a traditional Indian practice." *Id.* at 490. The Court concluded that the Tribe does not have "inherent sovereignty" to conduct the bingo games. *Id.* at 482.[6]

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[5] As explained later, the Fifth Circuit and the Ninth Circuit in an earlier decision held that Public Law 280 and the Organized Crime Control Act do not authorize state gambling laws to be applied on Indian reservations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); see page 14, *infra*. Both decisions, however, interpreted federal statutes, and did not apply the balancing test.

[6] In a second, alternative holding, the Maine Court held that the same result is supported by a federal statute, the Maine Indian Claims Settlement Act. *Id.* at 487-490.

In *Seneca-Cayuga*, the Oklahoma Supreme Court upheld Oklahoma's right to prohibit Indian commercial bingo, to the extent the games are played by non-Indians.[7] The Oklahoma Court rejected the tribal sovereignty argument, stating that "bingo is [not] a traditional tribal *activity*" and that its "main (and perhaps only) purpose" is "to generate funds for the Tribes." 711 P.2d at 90 (emphasis added). The Court held that, although Indian tribes have a "legitimate interest" in "economic development," this interest does not outweigh the State's "legitimate interest in preventing infiltration of organized crime . . . ." *Id.* at 90, 91. The Court, citing *Colville*, stated that this Court "has extended state laws to tribal commercial activities affecting substantial numbers of non-Indians, where such non-Indian citizens evade state laws by benefitting from an exclusively Indian exemption." *Id.* at 90-91.

Penobscot and *Seneca-Cayuga* directly conflict with the Ninth Circuit decision here. Indeed, the Ninth Circuit did not mention either *Penobscot* or *Seneca-Cayuga*, although both were called to its attention.

This Court dismissed the Tribe's appeal in *Penobscot* "for want of a substantial federal question." 464 U.S. 923 (1983). Since the dismissal of an appeal on such grounds is a disposition "on the merits," *Hicks v. Miranda*, 422 U.S. 332, 345 (1975), *Penobscot* is the law of the land, not just of Maine. The Ninth Circuit decision conflicts not only with the State court decision in *Penobscot*, but also with this Court's disposition of *Penobscot* on its merits.[8]

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[7] The Court remanded for determination of whether the tribal games were patronized by Indians or non-Indians. 711 P.2d at 92, & n. 76. This factual issue is not presented here because the Ninth Circuit stated that the tribal games, "are played predominantly by non-Indian participants." App. 2.

[8] In its Jurisdictional Statement, the Penobscot Tribe presented the question as follows:

> "May the State of Maine prohibit the operation of a bingo game by an Indian tribal government on its own reservation, when the revenues from the operation are used solely to finance tribal

IV

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER FEDERAL STATUTORY ENACTMENTS AUTHORIZE THE APPLICATION OF STATE GAMBLING LAWS ON INDIAN RESERVATIONS, AND TO RESOLVE THE UNCERTAINTY CAUSED BY ITS DECISIONS IN *RICE v. REHNER* AND *BRYAN v. ITASCA COUNTY*

Independently of *Rice* and *Colville*, which apply a common law balancing test in determining state jurisdiction over Indian reservations, Congress has enacted two statutes relevant here that provide for limited state jurisdiction: Public Law 280 and the Organized Crime Control Act. The Ninth Circuit held that neither enactment authorizes state and local gambling laws to be applied on Indian reservations. App. 3-6. This Court should grant review to determine whether these enactments apply here, and to clarify the relationship between these enactments and the common law principles applied in *Rice* and *Colville*.

A. Public Law 280

Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360, authorizes California and certain other states to exercise civil and criminal jurisdiction over Indian reservations. App. 23-25. On its face, Public Law 280 allows California to apply its gambling laws on Indian reservations. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court held that Public Law 280 does not enable Minnesota, a Public Law 280 state, to apply its property tax laws on Indian reservations. In dictum, the Court stated that Public Law 280 includes state criminal prohibitory laws but not state "civil regulatory" laws. *Bryan*, 426 U.S. at 390. The "civil regulatory-criminal prohibitory" distinction was dictum because the property tax laws involved in *Bryan* were not regulatory.

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government services and the State permits licensed bingo games and other forms of gaming off the reservation?" Jurisdictional Statement, *Penobscot Nation v. Stilphen*, No. 83-366, October Term, 1983.

The identical question, as applied to California, is presented here.

The *Bryan* dictum, viewed in light of this Court's later decision in *Rice v. Rehner, supra*, creates an anomaly concerning state regulatory jurisdiction over Indian reservations. In *Rice*, this Court held that state *regulatory* laws are applicable on Indian reservations, assuming that the balancing test supports this result. Under the *Bryan* dictum, Public Law 280 does not authorize state *regulatory* laws to be applied on Indian reservations under any circumstances. The two decisions can be superficially reconciled on grounds that *Bryan* interpreted a statute and *Rice* applied the common law. The anomaly arises, however, because the statute involved in *Bryan*—Public Law 280—was intended to *broaden* state jurisdiction over Indian reservations, but *Bryan* interpreted the statute as affording *less* regulatory jurisdiction than all states have under the common law balancing test applied in *Rice*. In other words, a federal statute intended to broaden state jurisdiction actually confers less jurisdiction than states already have under the federal common law.

This Court in *Rice*, perhaps to avoid the anomaly, cast doubts on *Bryan's* "civil regulatory-criminal prohibitory" dictum. The Court cited *Bryan* only for the view that state "tax" laws are not included under Public Law 280, thus implying that state *regulatory* laws may be included. 463 U.S. at 734 n. 18. The Court expressed general disapproval of distinctions between state "substantive" and "regulatory" laws, *id.*, which implies disapproval of *Bryan's* "civil regulatory-criminal prohibitory" distinction.

In any event, the anomaly created by *Rice* and *Bryan* has caused a split of authority, noted earlier, among lower courts concerning whether state gambling laws apply on Indian reservations. See page 5, *supra*. In *Seminole Tribe v. Butterworth, supra*, 658 F.2d 310, and *Barona Group v. Duffy, supra*, 694 F.2d 1185, both decided before *Rice*, the Fifth Circuit and Ninth Circuit applied the *Bryan* distinction in holding that state gambling laws—classified as "civil regulatory"—are not included under Public Law 280 and hence do not apply on Indian reservations. The Ninth Circuit in the instant proceeding followed its earlier decision in *Barona* in reaching the same conclusion. App. 5. On the other hand, in *Penobscot Nation v. Stilphen, supra*, 461 A.2d 478, and *Oklahoma v. Seneca-Cayuga Tribe, supra*, 711 P.2d 77,

the Maine Supreme Judicial Court and the Oklahoma Supreme Court applied the balancing test in holding that state gambling laws *are* applicable on Indian reservations. The Oklahoma Supreme Court in *Seneca-Cayuga* specifically criticized the *Bryan* distinction as "unpersuasive." 711 P.2d at 90. This split of authority has created the anomaly that, although Public Law 280 was intended to *broaden* state jurisdiction over Indian reservations, the Public Law 280 states involved in *Seminole* and *Barona* have *less* regulatory jurisdiction than the non-Public Law 280 states involved in *Penobscot* and *Seneca-Cayuga*. This anomaly mirrors the anomaly created by *Rice* and *Bryan*.

Indeed, the confusion between these lines of authority is reflected in the lower proceedings here. The district court below expressed the view that *Rice* overruled *Bryan*, but believed that it was constrained to follow the Ninth Circuit's earlier decision in *Barona*, which applied the *Bryan* distinction. App. 4; Tr. 4-5. The Ninth Circuit below acknowledged that:

> "*Rice* may be indicative of a trend away from the civil/regulatory-criminal/prohibitory distinction in determining the application of federal and, by incorporation, state statutes on Indian reservations." App. 5 n. 4.

The Ninth Circuit did not follow the trend, however, but instead applied the *Bryan* distinction in construing Public Law 280, and indeed, as noted below, extended the distinction in construing the Organized Crime Control Act. App. 5-6.

This Court should grant review to determine whether Public Law 280 applies here, and, perhaps more importantly, to clarify the relationship between the common law principles applied in *Rice* and the statutory enactment interpreted in *Bryan*. The time has come to end the confusion caused by *Rice* and *Bryan* and resolve the divergence of authority among lower courts concerning the issue here.

B. The Organized Crime Control Act

The Organized Crime Control Act (OCCA), 84 Stat. 937 (1970), 18 U.S.C. § 1955, prohibits gambling operations "in violation of the law of a State or political subdivision in which it is

conducted." App. 25-26. The OCCA, on its face, makes state and local gambling laws applicable on Indian reservations. The OCCA is relevant here in two ways. First, it directly applies state and local gambling laws on Indian reservations, independently of the *Rice* and *Colville* balancing test. Second, it embodies and expresses the federal interest under the balancing test itself. Under the balancing test, the federal interest as reflected in the OCCA supports the application of state gambling laws on Indian reservations. The OCCA expresses federal gambling policy as clearly as 18 U.S.C. § 1161 expresses federal liquor policy, and this Court in *Rice* held that the latter enactment supports the application of California liquor laws on Indian reservations.[9]

The Ninth Circuit, following its earlier decision in *Barona Group v. Duffy, supra*, held that California's gambling laws are "civil regulatory" and hence are not included under the OCCA. App. 5-6. The Ninth Circuit thus extended *Bryan's* "civil regulatory-criminal prohibitory" distinction to the OCCA. Nothing in the OCCA or its legislative history, however, supports the distinction. The Ninth Circuit simply borrowed the distinction from *Bryan*, which involved a different statute addressing a different subject matter. This Court in *Rice* rejected an analogous "substantive-regulatory" distinction in construing another federal statute—18 U.S.C. § 1611—stating that "in the absence of a context that might possibly require it, we are reluctant to make such a distinction." *Rice*, 463 U.S. at 734 n. 18. The Ninth Circuit displayed no such reluctance in extending the distinction to the OCCA. This Court should grant review to determine whether the distinction properly applies to the OCCA.

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[9] The Ninth Circuit, in holding that the federal interest supports the tribal position here, relied on a presidential policy statement encouraging tribal economic development. App. 8. The presidential statement, however, did not consider whether gambling is an appropriate means to achieve this goal. The OCCA, which specifically provides for the application of state gambling laws on Indian reservations, expresses federal policy here more clearly than the presidential statement, which did not consider the gambling question.

C. California Gambling Policy

Even assuming the validity of *Bryan's* "civil regulatory-criminal prohibitory" distinction, California's gambling laws are essentially prohibitory rather than regulatory, and hence are included under Public Law 280. California law prohibits all forms of lotteries except where specifically authorized by law, and specifically authorizes low stakes bingo for charitable purposes. Cal. Pen. Code §§ 320, 326.5. The purpose of the statutory scheme is to prevent organized crime from establishing, or gaining control of, gambling operations in California. Thus, California law prohibits a specific form of conduct—high stakes, commercial bingo—rather than licenses or regulates it. California gambling laws are thus prohibitory within the meaning of *Bryan*.

The Ninth Circuit ruled otherwise, following its earlier decision in *Barona*. According to the Ninth Circuit, California bingo statutes are "civil regulatory" because the regulated conduct does not violate California "public policy," in that California authorizes bingo for charitable purposes. App. 4.

The Ninth Circuit appeared to assume that, because California excepts charitable bingo from its general prohibition against gambling, California regulates bingo rather than prohibits it. Under this assumption, a state criminal statute, otherwise prohibitory, becomes regulatory when the state creates an exception. The assumption is a mechanical one, because it focuses on the form of the state criminal scheme rather than its purpose. The purpose of the California scheme is to prevent organized criminal infiltration in California, and to provide exceptions only where such infiltration is unlikely to occur. Charitable bingo creates little risk of criminal involvement; the games feature low stakes—the jackpots cannot exceed $250—and the games are regulated by strict statewide standards backed by the State's law enforcement apparatus.

The tribal games involved here, however, create substantial risks of organized criminal infiltration because they feature high stakes and are not regulated. The stakes include cars, pickups, boats, and cash awards of thousands of dollars. See note 1, *supra*. The federal government does not regulate, supervise, or monitor

the games; indeed, there is virtually no federal involvement at all. The Tribes themselves generally lack the law enforcement capability to ensure that the games are honestly run. The Cabazon Tribe here, for example, which has only 25 members, cannot undertake the screening and auditing necessary to guard against criminal infiltration. Moreover, the Tribe cannot adequately handle the law enforcement problems arising when hundreds of non-Indians enter the reservation to play the games. Indeed, the Tribe lacks criminal jurisdiction over the non-Indian players. See *Oliphant v. Sequamish Indian Tribe*, 435 U.S. 191, 208 (1978). Thus, high stakes tribal bingo creates risks of organized criminal involvement that do not arise respecting charitable bingo.

The National Gambling Review Commission, established by Congress in 1970 to study gambling in the United States, § 804, 84 Stat. 930, concluded that bingo is a highly regressive form of gambling that, if not properly regulated, is susceptible to control by organized crime. Cal. Exh. 7, at 160-166. The Commission's report stated that:

> "Despite bingo's popularity as a charity fund raiser and its reputation as a harmless pasttime, it has been the object of abuse by a number of sources: Illegal parlors resort to tricks to circumvent the law or openly defy it. Racketeers are thought to control bingo games—legal and illegal—in a number of urban areas. Skimming and other scams are practiced by both organized groups and shady independent operators." *Id.* at 164.

The Commission recommended that "those States allowing bingo adopt and actively implement regulations to insure that the games are honestly run." *Id.* at 166.

Therefore, California gambling laws are prohibitory rather than regulatory, and are not rendered less so by an exception for charitable bingo that poses no risks of organized criminal involvement. California "public policy," to use the Ninth Circuit test, is offended by the tribal games because they invite the very risks which California gambling policy is intended to prevent. Therefore, California laws are included under Public Law 280, even

assuming the validity of *Bryan's* "civil regulatory-criminal prohibitory" distinction.

D. The Ninth Circuit's "Public Policy" Test

Finally, this Court should grant review to determine whether the Ninth Circuit's "public policy" test properly differentiates between state "civil regulatory" and "criminal prohibitory" laws, assuming that the distinction is otherwise valid. Indeed, *Bryan* itself does not suggest a "public policy" test. In our view, the test is illusory because all state laws, whether regulatory or prohibitory, are manifestly based on state public policy. The test allows federal courts to subjectively determine which state laws apply on Indian reservations by substituting their own judgment of state public policy for the state legislative judgment, a result that Congress obviously did not contemplate. The test conflicts with the federalism principles embodied in Public Law 280 and the OCCA, and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for plenary consideration.

DATED: April 15, 1986

Respectfully submitted,

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Appendix 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6635
D.C. No. CV 84-1117

Cabazon Band of Mission Indians,
Plaintiff-Appellee,

v.

County of Riverside, State of California, and Ben Clark,
Defendants-Appellants.

D.C. No. CV 83-3037

Morongo Band of Mission Indians,
Plaintiff-Appellee,

v.

County of Riverside, State of California, and Ben Clark,
Defendants-Appellants.

[Filed Apr. 8, 1986]

AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted October 10, 1985—San Francisco, CA

Decided February 25, 1986

Before: Anderson, Farris, and Nelson, Circuit Judges

Anderson, Circuit Judge:

I. OVERVIEW

The State of California (State) and County of Riverside (County) appeal the district court's granting of the Cabazon and Morongo Indians' (Tribes) motion for summary judgment and its issuance of permanent injunction restraining the State and

County from applying their gambling laws on the reservation. The only issue on appeal is whether state and local gambling laws apply on Indian reservations. We affirm.

II. FACTS

The facts, as stipulated by the parties, are as follows:

The Tribes occupy separate reservations situated in Riverside Country, California. The Tribes conduct bingo games for profit on their reservations. The profits are the sole source of income for the Tribes and the games provide the main source of employment. The Tribes have their own ordinances regulating the bingo games. The games are operated by non-Indian professional operators, who receive a percentage of the profits. The games are played predominantly by non-Indian participants. The jackpots exceed $250. Under California law, bingo games may be played only for bona fide charitable purposes; the games must be operated by members of the charitable organization; and the jackpots cannot exceed $250. The Tribes' bingo games violate these provisions.

The Cabazon Band also conducts three card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. A Riverside County ordinance prohibits the playing of these games.[1]

The Tribes filed an action for declaratory and injunctive relief and for damages against Riverside County, alleging that the County could not lawfully prohibit the bingo and card games on the reservation. The State of California intervened. The parties filed cross motions for summary judgment on the jurisdictional question whether State and County gambling laws apply on reservations. The district court granted the Tribes' motion for summary judgment and denied the County and State's motion. The district court issued final judgment on the jurisdictional issues under Rule 54(b) of the Federal Rules of Civil Procedure;

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[1] We find no basis upon which to distinguish the Tribe's bingo activities from the Tribes' card parlor games. Therefore, our discussion in this case, although specifically addressing the bingo games, applies with equal force to the card games.

issued a permanent injunction restraining the County and State from applying their gambling laws on the reservation; and retained jurisdiction to consider the damages issue. The County and State appealed.

III. DISCUSSION

The State contends that state and local laws pertaining to gambling should apply on Indian reservations under (1) Public Law 280, (2) The Organized Crime Control Act, or (3) federal common law.

A. Public Law 280

The Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (Public Law 280) provides some applicability of state law over on-reservation activities. Section 4, codified at 28 U.S. C. § 1360, grants states civil jurisdiction over Indian reservations in words that on the surface seem to make all state laws of general application effective.[2] *Barona Group of Capitan Grande Band, etc. v. Duffy*, 694 F.2d 1185, 1187 (9th Cir. 1982). The Supreme Court, however, has limited the section to give states jurisdiction only over private civil litigation involving reservation Indians in state court. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976); *Barona*, 694 F.2d at 1187-88. Section 2 of Public Law 280, codified at 18 U.S.C. § 1162, confers on certain states, including California, full criminal jurisdiction over offenses committed by Indians on the reservation.[3] *Barona*, 694 F.2d at 1188. Thus,

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[2] Section 4(a), as codified at 28 U.S.C. § 1360(a)(1976), provides:

(a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . :

. . . .

California . . . . All Indian country within the State.

[3] Section 2(a), as codified at 18 U.S.C. § 1162(a)(1976), provides:

Public Law 280 authorizes the application of state "criminal/prohibitory" laws on Indian reservations, but not "civil/regulatory" laws. *Id.* This court has held that a state law is criminal/prohibitory if the activity the statute addresses violates "public policy," and civil/regulatory if the activity does not. *Barona*, 694 F.2d at 1188-90. Therefore, the issue that must be resolved in this case is whether the gambling activities conducted by the Tribes on their reservations violate the public policy of the State of California.

This court specifically held in *Barona* that the same California gambling law in question in this case does not, for a variety of reasons, violate California public policy. *Id.* Hence, said the court in *Barona*, the California law is civil/regulatory and does not apply to the Indian reservations. *Id.*

The district court judge ruled that *Barona* is dispositive in the present case. However, he also felt, and the State argues, that the Supreme Court's recent decision in *Rice v. Rehner*, 463 U.S. 713 (1983), supports a re-examination of *Barona* and the civil/regulatory-criminal/prohibitory distinction. In *Rice*, the Supreme Court rejected what it terms the "substantive-regulatory" distinction because neither the text of 18 U.S.C. § 1161 (a federal Indian statute which incorporates state law) nor its legislative history reveal any such distinction. *Rice*, 463 U.S. at 734 n. 18. The Court went on to say that "[i]n the absence of a context that might possibly require it, we are reluctant to make such a distinction." *Id.* It can be said with equal force that neither the text nor the legislative history of Public Law 280 reveal any civil/regulatory-criminal/prohibitory distinction. However, the Supreme Court, in interpreting Public Law 280, has stated that "statutes passed for the benefit of dependent Indian tribes . . . are

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(a) Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . :

. . . .

California . . . . All Indian country within the State.

to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan*, 426 U.S. at 392. Although the regulatory bingo statute may arguably be interpreted as prohibitory, the resolution must be in favor of the Indian tribe. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981). Furthermore, we are bound by the precedent established by this circuit in *Barona*[4] which is factually and legally indistinguishable from the case at bar. Therefore, we hold that the gambling activities of the Tribes on the Indian reservation do not violate California public policy. For that reason, we find that California's bingo statute is civil/regulatory in nature and does not apply, under Public Law 280, on the Indian reservations.

B. The Federal Organized Crime Control Act

The Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1976) (OCCA) incorporates by reference certain state gambling laws and makes the violation of the state provisions a federal offense.[5]

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[4] *Rice* may be indicative of a trend away from the civil/regulatory-criminal/prohibitory distinction in determining the application of federal and, by incorporation, state statutes on Indian reservations. However, *Rice* does not overrule *Barona* nor does it alter its precedential weight. *Rice* involved the interpretation of 18 U.S.C. §1161, a statute not involved here. Furthermore, one of the principal underpinnings of the *Rice* decision was the fact that in the particular context of liquor licensing, the Court found no "firm federal policy of promoting tribal self-sufficiency and economic development." *Rice*, 463 U.S. at 724 (quoting *White Mountain*, 448 U.S. at 143)). As we discuss below, the same is not true with respect to tribal bingo activities.

[5] The Organized Crime Control Act, 18 U.S.C. § 1955 provides:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

In *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), this court held that whether a tribal activity is "a violation of the law of a state" within the meaning of the OCCA depends on whether it is contrary to the "public policy" of the state. *Id.* at 895-96; *Barona*, 694 F.2d at 1190. "Thus, *Farris* makes co-extensive the tests for application of state law to Indian reservations under [the OCCA] and for direct application of state law under Public Law 280." *Barona*, 694 F.2d at 1190. Because we have concluded that bingo games are not contrary to the public policy of California, the activity is not violative of the OCCA.

C. Federal Common Law

We turn now to the State's argument that the Supreme Court has adopted a federal common law in determining the applicability of state laws on Indian reservations.[6] This requires a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). *See also Queets Band of Indians v. State of Washington*, 765 F.2d 1399, 1406 (9th Cir. 1985), *vacated upon settlement of the parties*, 783 F.2d ____ (1986). Under this particularized inquiry test, state laws may be applied to Indian reservations unless such application would (1) interfere with reservation self-government, or (2) impair a right granted or reserved by federal law. *Rice*, 463 U.S. at 718; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

[6] We examine this argument only after having decided that there is no federal law preempting the determination of the applicability of state and local gambling laws on Indian reservations. Although resort to federal common law occurs only as a "necessary expedient" in a "few and restricted instances," resort may be had to federal common law in the absence of an applicable Act of Congress. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981).

The Supreme Court's decision in *Rice* states that "our recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.' " *Rice*, 463 U.S. at 718 (quoting *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 172 (1973)). However, aside from a strong federal policy to encourage and foster tribal self-government and to promote reservation economic development, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), there is apparently no federal law preempting the determination of the applicability of state and local gambling laws on Indian reservations. Therefore, federal law does not create a barrier to the application of state and local gambling laws on Indian reservations.[7] However, our analysis does not end here.

Federal preemption is only one of two barriers to state jurisdiction; such jurisdiction is also barred if it would impermissibly infringe upon the right of the reservation Indians to make their own laws and to be governed by them. *Williams v. Lee*, 358 U.S. 217, 221 (1959). As has been pointed out by the Supreme Court, the concept of tribal sovereignty and independence still plays a role in the preemption analysis to the extent that it provides a "backdrop" against which federal policy and interests must be measured. *White Mountain*, 448 U.S. at 143, 100 S.Ct. at 2583; *McClanahan*, 411 U.S. at 172, 93 S.Ct. at 1262. The role of inherent tribal sovereignty in preemption analysis is defined by "notions of sovereignty that have developed from historical traditions of tribal independence." *Rice*, 463 U.S. at 719 (quoting *White Mountain*, 448 U.S. at 145, 100 S.Ct. at 2584). "When we determine that tradition has recognized a sovereign immunity in favor of the Indians . . . , then we usually are reluctant to infer that Congress has authorized the assertion of state authority . . . ." *Rice*, 463 U.S. at 719.

Accordingly, we turn to the state, federal and tribal interests at stake in order to determine whether application of the state and local gambling laws will interfere with reservation self-govern-

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[7] At the same time, federal law does not promote nor allow for the application of these laws on the reservations.

ment. If so, then these laws may not be applied on the reservation under the federal common law's particularized inquiry test.

1. State Interest

The State contends that it has a significant state interest in prohibiting tribal bingo games in order to prevent the intrusion of organized crime in California. Although this is a legitimate concern, there is no evidence whatsoever that organized crime exists on these Indian reservations. Furthermore, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain*, 448 U.S. at 144. The California bingo laws regulate only the *operation* of certain types of gambling. These laws do not make it a crime to *participate* in the gambling activities. Therefore, the state gambling laws are directed at the on-reservation conduct of the Tribes and not the conduct of non-Indians on the reservations. As a consequence, we find that the State's interest, although commendable, is weak.

2. Federal Interest

Current federal policy is to encourage and foster tribal self-government and to promote reservation economic development. *See Mescalero Apache Tribe*, 462 U.S. 324 (citing to and quoting from numerous federal statutes that support these goals). This federal policy was further evidenced by President Reagan's statement that: "It is important to the concept of self government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self government." *Statement by the President: Indian Policy*, The White House, January 24, 1983. Furthermore, tribal bingo games have been recognized as one way to support this policy. A policy directive issued by the Assistant Secretary of the Interior on March 2, 1983 stated that the Department of the Interior would "strongly oppose" any proposed legislation that

> would subject Indian individuals, Indian organizations, and tribal governments to state laws with regard to licensing, regulation or prohibition of gambling on Indian reservations

> . . . . Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983 . . . . A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced.

Finally, an affidavit submitted on behalf of the Tribes by the Director of Indian Services, Bureau of Indian Affairs, stated that:

> It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983.

Based on the foregoing, we find the federal interest to be strong.

3. Tribal Interests

The Tribes offer a number of compelling interests in favor of their position. The bingo games operated on the reservations are the Tribes' only source of income. The games are the major source of employment for the reservation Indians and the sole source of revenue for operating their tribal governments and for providing services to their members.

The State argues that the tribal interest is weak for two reasons: (1) they are "marketing an exemption" from state laws to non-Indians who go on the reservation; and (2) the tribal tradition does not encompass commercial gambling, particularly where predominantly non-Indian participants are involved.

A. Marketing an Exemption

In support of their contention that the Tribes are "marketing an exemption" from California law, the State cites *Washington v.*

Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

In *Colville*, the Indian tribes sought to bar the State of Washington from enforcing a cigarette excise tax and a general sales tax on cigarette sales by on-reservation tobacco outlets to non-Indian purchasers. The Supreme Court held that the imposition of these taxes on on-reservation purchases of cigarettes by non-Indians was valid. For the following reasons, we find that *Colville* does not support the State's contention.

First, the Supreme Court in *Colville* did not rule that a Tribe's "marketing of a [tax] exemption" enabled the state to prohibit the Tribe from engaging in the underlying activity, which is what the State is trying to accomplish in this case. Rather, the Court ruled that if all the Tribe is marketing to non-Indians is an exemption from state taxes which the state would otherwise use to provide off-reservation services to off-reservation residents, then the Tribe's legitimate interest in making those sales would not outweigh the state's legitimate interest in taxing those same transactions. In the current case, the tribal interest in providing revenue and jobs for its members outweighs the State's interest in protecting against the *potential* for intrusion of organized crime.

Second, in *Colville*, the Court recognized that the Tribe's interest in generating revenues for essential governmental programs "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes . . . ." *Colville*, 447 U.S. at 156-57. *See Mescalero Apache Tribe*, 462 U.S. at 337. Even the State concedes that "the revenues here are derived from value generated by on-reservation activities . . . ." Appellant's Brief at 28, n.11. Instead of merely importing products to resell in a manner which deprives the State of revenues which would be used to provide state services off-reservation, the Tribes in this case built and help operate gambling facilities, employ tribal members, regulate and conduct these activities wholly within their reservation, and utilize the funds to provide necessary governmental services for their members. We agree with both parties that the revenues here are derived from value generated on the reservation by activities involving the Tribes. We therefore find the Tribes' interest to be strong.

B. Tribal Tradition

As we pointed out earlier, tribal tradition remains highly relevant in determining whether state laws apply on Indian reservations. The State contends that the Tribes involved in this case did not traditionally engage in tribally sponsored, high stakes commercial gambling operations catering primarily to non-Indian participants. Therefore, since no such tradition exists, we "may accord less weight to the 'backdrop' of tribal sovereignty." *Rice*, 463 U.S. at 720.

We find it unnecessary to decide this issue because we believe that the State's focus is too narrow. The focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity. The Tribes in this case are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority. One of our recent decisions supports this analysis. In *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *modified* at 665 F.2d 1390 (1982), we cited zoning and automobile registration as examples of activities which, though obviously not "traditional" tribal activities, were nonetheless among the "traditional governmental functions" currently exercised by Indian tribes. *Id.* at 1110.

Having determined that a tradition exists which recognizes a sovereign immunity in favor of the Indians, we are reluctant to infer that the State should exercise authority in this case. *See Rice*, 463 U.S. at 719; *see also Queets*, 765 F.2d at 1407.

In light of the foregoing discussion, we find that the federal and tribal interests at stake here outweigh the State's interest. Therefore, under the federal common law's particularized inquiry test, the State and County may not apply their gambling laws on the Indian reservations because application of these laws would interfere with reservation self-government.

We affirm the summary judgment and the permanent injunction restraining the County and the State from applying their gambling laws on the reservations.

AFFIRMED.

Appendix 2

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THE CABAZON BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

THE CABAZON BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
and BEN CLARK
Defendants,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
Defendant,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

[Filed Dec. 6, 1984]

ORDER

The motion of plaintiff Cabazon Band of Mission Indians for partial summary judgment against defendants County of Riverside, California and Sheriff Ben Clark, and defendant-intervenor State of California having come on for hearing on Monday, November 5, 1984, and the Court having considered the papers filed by the parties and having heard the arguments of counsel, and the Court having accepted the Agreed Upon Statement of Uncontroverted Facts as between the parties, and having issued its Findings of Fact and Conclusions of Law, and good cause appearing therefore,

IT IS HEREBY ORDERED that the motion of plaintiff Cabazon Band of Mission Indians for partial summary judgment against defendants and defendant-intervenor is granted and the motion of defendants and defendant-intervenor for summary judgment against the plaintiff is denied, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

1. California Penal Code § 326.5 and Riverside County Ordinance Number 558 are of no force and effect on and within the boundaries of the Cabazon Indian Reservation against the Cabazon Band of Mission Indians, its members or other persons engaging in, or permitting to be played, tribally sponsored and sanctioned bingo games.

2. The defendants and defendant-intervenor are without authority or jurisdiction to enforce or attempt to enforce California Penal Code § 326.5 or Riverside County Ordinance Number 558 against the Cabazon Band of Mission Indians, its members or other persons engaging in or permitting to be played tribally sponsored and sanctioned bingo games on and within the boundaries of the Cabazon Indian Reservation.

3. Defendants County of Riverside, California and County Sheriff Ben Clark, and defendant-intervenor State of California, their successors, assigns, officers, agents, employees, attorneys and all other persons acting on their behalf or in concert with them, are hereby permanently restrained and enjoined from taking any steps to enforce or to attempt to enforce California Penal Code § 326.5 or Riverside County Ordinance Number 558

against the Cabazon Band of Mission Indians, its members or other persons engaging in, or permitting to be played, tribally sponsored and sanctioned bingo games on and within the boundaries of the Cabazon Indian Reservation.

4. California Penal Code §§ 330-31 and Riverside County Ordinance Number 331 are of no force and effect on and within the boundaries of the Cabazon Indian Reservation against the Cabazon Band of Mission Indians, its members or other persons engaging in, permitting to be played, or wagering on the tribally sponsored and sanctioned games of draw poker, lowball draw poker, panguingue or other card games not prohibited under California Penal Code §§ 330-31.

5. Defendants and defendant-intervenor are without authority or jurisdiction to enforce or attempt to enforce California Penal Code §§ 330-31 or Riverside County Ordinance Number 331 on and within the boundaries of the Cabazon Indian Reservation against the Cabazon Band of Mission Indians, its members or other persons engaging in, permitting to be played, or wagering on the tribally sponsored and sanctioned games of draw poker, lowball draw poker, panguingue, or other card games not prohibited under California Penal Code §§ 330-31.

6. Defendants County of Riverside, California and County Sheriff Ben Clark, and defendant-intervenor State of California, their successors, assigns, officers, agents, employees, attorneys and all other persons acting or attempting to act on their behalf or in concert with them, are hereby permanently restrained and enjoined from taking any steps to enforce California Penal Code §§ 330-31 or Riverside County Ordinance Number 331 on and within the boundaries of the Cabazon Indian Reservation against the Cabazon Band of Mission Indians, its members or other persons engaging in, permitting to be played, or wagering on the tribally sponsored and sanctioned games of draw poker, lowball draw poker, panguingue or other card games not prohibited under California Penal Code §§ 330-31.

7. Plaintiff shall recover its cost of suit herein from defendants and defendant-intervenor.

8. Pursuant to Local Rule 16.10, plaintiff shall have until 30 days following the entry of final judgment on the remaining damage claim to file and serve a single application for attorneys fees and expenses covering the entirety of this case.

Dated: 6 Dec 84

/s/ LAUGHLIN E. WATERS
Laughlin E. Waters
United States District Judge

Submitted by:

/s/ GLENN M. FELDMAN
Glenn M. Feldman
Attorney for Plaintiff

Approved As To Form:

/s/ GLENN SALTER by RW
Glenn Salter
Deputy County Counsel

/s/ RODERICK WALSTON
Roderick Walston
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Appendix 3

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

THE CABAZON BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
and BEN CLARK
Defendants,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
Defendant,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

[Filed Dec. 5, 1984]

JUDGMENT

On Monday, November 5, 1984, the motion of plaintiff Cabazon Band of Mission Indians for partial summary judgment against defendants County of Riverside, California, Sheriff Ben Clark and defendant-intervenor State of California and defendants' and defendant-intervenor's cross motion for summary judgment against plaintiff came on for hearing before the Court. The Court having considered the papers filed by the parties and the arguments of counsel, and having duly rendered its decision, having entered an appropriate Order and having issued Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ANNOUNCED that plaintiff's motion for partial summary judgment is granted and defendants' and defendant-intervenor's motion for summary judgment is denied, and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall recover its cost of suit herein from defendants and defendant-intervenor and pursuant to Local Rule 16.10, plaintiff shall have until 30 days following the entry of final judgment on the remaining damage claim to file and serve a single application for attorneys fees and expenses covering the entirety of this case, and

IT IS FURTHER ORDERED AND ADJUDGED that while the granting of plaintiff's motion for partial summary judgment does not dispose of plaintiff's damage claim against defendants, which claim must still be adjudicated by this Court, pursuant to Rule 54(b), Fed. R. Civ. P., the court has determined that there is no just reason for delay and directs that this judgment be entered.

Dated: Dec 84

/s/ Laughlin E. Waters
Laughlin E. Waters
United States District Judge

Submitted by:

/s/ Glenn M. Feldman
Glenn M. Feldman
Attorney for Plaintiff

Approved As To Form:

/s/ Glenn Salter by RW
Glenn Salter
Deputy County Counsel

/s/ Roderick Walston
Roderick Walston
Assistant Attorney General

Appendix 4

United States District Court
Central District of California

Case Number CV 83 1117 LEW (Tx)

Cabazon Band of Mission Indians
Plaintiff(s)
vs.
Cnty of Riverside et al
Defendant(s)

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that partl Summary Jgmnt has been entered in favr of pltf; deft & deft-intrvnr's mot fr S/J DENIED; defts permantly enjoined agnst tkng measures to enfrce Cal Penal Codes or Riverside Cnty ordnces as to pltf's tribally sancnd bingo games or card games in the above entitled case was entered in the docket on 12-10-84

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Appendix 5

United States District Court
Central District of California
Case Number CV 83 3037 LEW (JRx)
Morongo Band
Plaintiff(s)
vs
Riverside Cnty & B Clrk
Defendant(s)

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD

You are hereby notified that ORD tht Cabazon Band of Mission Indians fr partl S/J GRNTD, & mot of defts & deft-intrvnr fr S/J DEN re plyng of tribally sponsrd bingo games, draw poker, lowball poker, & othr card games & ORD tht Cabazon to recvr costs of suit & atty's fees & expenses following entry of fnl jgmnt in the above entitled case was entered in the docket on 12-10-84.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Appendix 6

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6635
D.C. No. CV 83-1117 (LEW) (TX)

Cabazon Band of Mission Indians,
Plaintiff-Appellee,

v.

County of Riverside, State of California, and Ben Clark,
Defendants-Appellants.

D.C. No. CV 83-3037 (LEW)

Morongo Band of Mission Indians,
Plaintiff-Appellee,

v.

County of Riverside, State of California, and Ben Clark,
Defendants-Appellants.

[Filed April 14, 1986]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

The State of California, Riverside County, and Ben Clark hereby appeal the decision of this court, as amended, rendered in *Cabazon Band of Mission Indians v. County of Riverside, et al.*, and *Morongo Band of Mission Indians v. County of Riverside, et al.*, No. 84-6635. The amended decision from which the appeal is taken was rendered on April 8, 1986. The appeal is filed pursuant to 28 U.S.C. § 1254(2), and is filed with respect to all parts of said decision.

Dated: April 14, 1986

John K. Van de Kamp
Attorney General
of the State of California
Roderick E. Walston
Rudolf Corona, Jr.
Deputy Attorneys General

By RODERICK E. WALSTON
Deputy Attorney General

Gerald J. Geerlings
County Counsel
Peter H. Lyons
Principal Deputy
Glenn R. Salter
Deputy

By GLENN R. SALTER
Deputy County Counsel
Attorneys for Defendants-
Appellants

Appendix 7

I. Public Law 280 provides as follows:

"State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of

any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

67 Stat. 588 (1953), 28 U.S.C. § 1360.

* * *

"State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	AllIndian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is

subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction."

67 Stat. 588 (1953), 18 U.S.C. § 1162.

II. The Organized Crime Control Act provides as follows:

"Prohibition of illegal gambling businesses

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business, shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

"(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

"(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity."

84 Stat. 937 (1970), 18 U.S.C. § 1955.

Appendix 8

Survey of Tribal Bingo Operations
Conducted by U.S. Department of
The Interior, 1985

Northern Cheyenne (Montana)
Chippewa Cree Tribe (Montana)
Eastern Band of Shoshone and the Northern Arapahoe Tribe (Wyoming)
Ft. Peck Assiniboine and Sioux Tribe (Montana)
Ft. Belknap Indian Community (Montana)
Blackfeet Tribe (Montana)
Seminole Tribe of Florida (Florida)
Seneca Nation of Indians (New York)
St. Regis Mohawk Tribe (New York)
Eastern Cherokee (North Carolina)
Poarch Band of Creek Indians
Tulalip Tribes of the Tulalip Reservation (Washington)
Confederated Tribes of Siletz (Oregon)
Puyallup Tribe (Washington)
Muckleshoot Indian Tribe (Washington)
Confederated Salish & Kootenai Tribes (Montana)
Lower Elwha Tribal Community (Washington)
Makah Indian Tribe (Washington)
Quileute Indian Tribe (Washington)
Shoalwater Bay Indian Tribe (Washington)
Turtle Mountain Band of Chippewa Indians (North Dakota)
Winnebago Tribe (Nebraska)
Omaha Tribe of Nebraska (Nebraska)
Flandreau Santee Sioux Tribe (South Dakota)
Lower Brule Sioux Tribe (South Dakota)
Sisseton-Wahpeton Sioux Tribe (South Dakota)
Yankton Sioux Tribe (South Dakota)
Devils Lake Sioux Tribe (North Dakota)
Osage Tribe of Indians (Oklahoma)
Thlopthlocco Tribal Town (Oklahoma)
Muscoge (Creek) Nation of Oklahoma (Oklahoma)
Chickasaw Nation (Oklahoma)
Seneca-Cayuga (Oklahoma)

Eastern Shawnee Tribe of OK (Oklahoma)
Iowa Tribe of Kansas and Nebraska (Oklahoma)
Prairie Band Patawatomi/Kansas (Kansas)
Kickapoo Tribe of Kansas (Kansas)
Cheyenne-Arapaho Tribes of Oklahoma (Oklahoma)
Apache Tribe of OK (Oklahoma)
Comanche Tribe of Oklahoma (Oklahoma)
Ft. Sill Apache Tribe (Oklahoma)
Kiowa Comanche Apache Bingo (Oklahoma)
Kiowa Tribe of OK (Oklahoma)
Kaw or Kansa Tribe of OK (Oklahoma)
Otoe-Missouria Tribe of Oklahoma (Oklahoma)
Pawnee Tribe of Oklahoma (Oklahoma)
Ponca Tribe of Oklahoma (Oklahoma)
Tonkawa Tribe of Oklahoma (Oklahoma)
Sac & Fox of Oklahoma (Oklahoma)
Iowa Tribe of Oklahoma (Oklahoma)
Bishop Tribal Council (California)
Chicken Ranch (California)
Santa Rosa Rancheria (California)
Laytonville Rancheria (California)
Hoopa Valley Tribe (California)
Resighini Rancheria (California)
Pit River Tribe (California)
Barona Group of Mission Indians (California)
Cabazon Band of Mission Indians (California)
Mo[illegible]ngo Band of Mission Indians (California)
Rincon Band of Mission Indians (California)
Santa Ynez Band of Mission Indians (California)
Soboba Band of Mission Indians (California)
Sycuan Band of Mission Indians (California)
Citizen Band Potawatomi Tribe of Oklahoma (Oklahoma)
Absentee Shawnee Tribe of Oklahoma (Oklahoma)
Chemehuevi Tribe (California)
Quechan Tribe (Arizona)
Yavapai-Prescott Indian Tribe (Arizona)
Ft. McDowell Mohave-Apache (Arizona)
Leech Lake Band of Minnesota Chippewas (Minnesota)
Mille Lacs Band of Chippewas (Minnesota)

Grand Portage Band of Minnesota Chippewas (Minnesota)
White Earth Band of Minnesota Chippewas (Minnesota)
Fond du Lac Band of Minnesota Chippewas (Minnesota)
Prairie Island Community Council (Minnesota)
Lower Sioux Indian Community (Minnesota)
Shakopee Midewakanton Sioux (Minnesota)
Sault Ste. Marie Tribe of Chippewa Indians (Michigan)
Saginaw Chippewa Indian Tribe (Michigan)
Keweenah Bay Indian Community (Michigan)
Bay Mills Indian Community (Michigan)
Grand Traverse Band of Ottawa & Chippewa Indians (Michigan)
Hannahville Indian Community (Michigan)
Forest County Potawatomi Tribe (Wisconsin)
Wisconsin Winnebago Business Committee (Wisconsin)
Lac Courte Oreilles (Wisconsin)
Stockbridge Munsee (Wisconsin)
Bad River Band of Lake Superior Chippewa Indians (Wisconsin)
Sokaogon Chippewa (Wisconsin)
St. Croix Chippewa (Wisconsin)
Lac du Flambeau (Wisconsin)
Oneida (Wisconsin)
Red Lake Band of Chippewa Indians (Minnesota)
Menominee Indian Tribe of Wisconsin (Wisconsin)
Pueblo of Sandia (New Mexico)
San Juan Pueblo (New Mexico)
Pueblo of Acomita (New Mexico)
Southern Ute Indian Tribe (Colorado)
Ute Mountain Ute (Colorado)

A survey conducted by the California Attorney General's office in late 1985, after the above Department of the Interior survey was completed, indicated that 26 tribal bingo operations are in effect on 26 different reservations or rancherias in California.

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

---

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT

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QUESTION PRESENTED

Whether a state law and a local ordinance regulating the operation of bingo games can be applied to prevent federally-recognized Indian tribal governments from conducting bingo games on their reservations, where such games are sanctioned by the Department of the Interior and provide the sole source of revenue and the main source of employment for the tribes?

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The Cabazon and Morongo Bands of Mission Indians, appellees herein, respectfully move to dismiss this appeal on the grounds that it is not within the jurisdiction of the Court under 28 U.S.C. § 1254(2) or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit on the grounds that the decision below was correct and the question presented is so unsubstantial as to warrant no further review.

If the Court determines that it lacks appellate jurisdiction in this case and treats the appellants' jurisdictional statement as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, appellees request that this motion be considered a brief in opposition to such petition.

STATEMENT OF THE CASE

The Morongo Band of Mission Indians and the Cabazon Band of Mission Indians are both federally-recognized Indian tribes having government-to-government relationships with the United States. Their reservations consist of 32,000 acres and 1,700 acres of desert land, respectively, which are held in trust for the tribes by the United States. The reservations are located in Riverside County, California. Neither reservation has any known natural resources (*e.g.*, timber, fish, wildlife, oil or coal) which could be used to generate revenue for the operation of their tribal governments or for the provision of services to their members. Both tribes conduct tribal bingo games and the Cabazon Band also operates a card room,[1] which serve as the sole source of funds for their tribal governments and for the provision of services for their members.

Prior to the creation of its tribal bingo enterprise, the unemployment rate for Morongo's nearly 800 members was

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[1] The Cabazon card room permits only the playing of three specific games which are lawful in the State of California. It is identical in nature to more than 400 similar establishments scattered throughout the state.

64% and most members were poverty stricken. Because less than one square mile of the reservation was suitable for economic development, the Morongo Band authorized the establishment of a tribal bingo enterprise to generate revenues for its tribal government and to provide for the health, education, and welfare of its members. The bingo enterprise is regulated by the tribe through its tribal bingo ordinance, and its management contract is approved by the Secretary of the Interior pursuant to 25 U.S.C. § 81. Nearly ninety members are employed in the tribal bingo enterprise, and the tribe takes an active role in overseeing and controlling the bingo operations.

The Cabazon Band is governed by Articles of Association which have been approved by the Secretary of the Interior, and it has adopted tribal ordinances authorizing and regulating its tribal bingo enterprise and card club. In addition to providing tribal revenues, the enterprises provide employment opportunities for all tribal members that need jobs, particularly those with the fewest job skills and the least chance for employment elsewhere.

These tribal enterprises have become especially critical to the continued existence of these tribes as federal funds for Indian programs have been sharply reduced. As the House Committee on Interior and Insular Affairs stated in its recent report on H.R. 1920, the Indian Gaming Regulatory Act:

> many tribes, faced with severe cuts in Federal program aid supporting tribal government and tribal programs and lacking a tax base or other source of governmental revenue, have turned to gaming as a source of such revenue. In this respect, they are not unlike many state governments who have turned to State lotteries or other forms of gaming to supplement their tax revenue.

H.R. Rep. No. 488, 99th Cong., 2d Sess. (March 10, 1986) 12.[2] And, as Mr. Udall, the Committee Chairman, stated in his Supplemental Views on H.R. 1920:

> No segment of our population has been more devastated by reductions in Federal programs. Gramm-Rudman, for the tribes, is not a matter of cutting the fat or even losing a little flesh. For them, it is literally a matter of life and death. It is little wonder that they have so desparately turned to gaming for revenue. It is hard to understand those who would deny them this small source of hope.

Appendix at 53a. The funds from these tribal enterprises are being used by the tribes to improve living conditions on their reservations; to establish, equip and train a tribal fire department; to repair and maintain the reservation water system; to build a center and establish programs for senior citizens; to establish pre-school and day care programs for the children; to provide health care services; to establish a reservation security force; to fund the extension of basic utility services to the reservation; to pay for traditional funeral and mourning ceremony expenses and the upkeep of the tribal cemetery; and to establish a tribal court system. Most of these activities would previously have been funded by the Federal Government.

At issue in this case is the right of these tribal governments to permit, regulate and operate their tribal bingo games under tribal law and ordinance, free from the regulatory jurisdiction of the State and County governments. It must be noted that California law regulates only the operators—here the Cabazon and Morongo Bands—of a

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[2] As discussed more fully below, at pages 8-11, on April 21, 1986 the House of Representatives passed H.R. 1920, the Indian Gaming Regulatory Act, and referred it to the Senate. The House Report on H.R. 1920 is attached hereto as Appendix 1.

bingo enterprise, not the playing of or participation in the game. Members of the public are entirely free to participate in whatever games they choose, as frequently as they desire and to whatever degree they wish. In fact, California law requires that "all bingo games shall be open to the public," not just to the members of the group sponsoring the games. Calif. Penal Code § 326.5 (g). While California law regulates some aspects of bingo,[3] California law does not regulate the number of games which an eligible organization may operate, the number of games which any participant may play, the amount of money a participant may spend or the admission prices to participate, the total receipts or expenditures of the operation, the number of organizations eligible to conduct bingo games, or the advertising of bingo games to the general public.

Under California state law, a broad range of organizations can sponsor bingo. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1189 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983). Indian tribes, however, have been excluded from this list. Therefore, if California's bingo laws applied on the reservations, these tribes would be prevented from operating bingo games, and would be wholly deprived of the governmental revenues and employment opportunities that these games provide.

As will be discussed more fully below, the only interest asserted by the appellants herein is to prevent the potential for the intrusion of organized crime. However, the court of appeals found that there was no evidence of or-

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[3] State law limits bingo prizes to $250 per game. The prizes awarded at the Cabazon and Morongo games sometimes exceed this limit. However, the magnitude of these prizes should not be exaggerated. The evidence on the record below shows that the *average* prize for all bingo games on the Cabazon Reservation during a representative four month period in 1984 was $184.89, well *below* the state limit. Supplemental Excerpt of Record at 41.

ganized crime on these reservations, and the U.S. House of Representatives made the same finding nationally in its report on H.R. 1920.

SUMMARY OF ARGUMENT

On three previous occasions, this Court has declined the opportunity to address the right of Indian tribes to sponsor bingo games on their reservations.[4] This case presents the same question. For the reasons discussed below, we believe that it is both unnecessary and inappropriate for the Court to grant plenary review in this case.

First, the appeal should be dismissed because the case is not within the Court's appellate jurisdiction under 28 U.S.C. § 1254(2).

In addition, Congress has studied this matter extensively and is currently in the process of enacting comprehensive legislation dealing with tribal gaming activities. Under these circumstances, we believe that the Court should decline to hear this case so as to allow Congress the opportunity to exercise its oversight and legislative functions in the field of Indian affairs.

Finally, the decision of the court of appeals is correct both as to the method of analysis used and the result reached, is consistent with every federal court decision on the subject, and presents no substantial federal question requiring further consideration by this Court.

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[4] *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed* 464 U.S. 923 (1983).

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THE COURT'S APPELLATE JURISDICTION UNDER 28 U.S.C. § 1254(2)

Because the court of appeals did not invalidate any state law, consideration of this case as an appeal under 28 U.S.C. § 1254(2) is clearly improper. An examination of the court of appeal's decision demonstrates that it merely held that the State and County may not apply their laws on the appellees' Indian reservations because application of these laws would infringe upon the right of the tribes to make their own laws and be governed by them. Appellants' Appendix at A-11.[5] In its recent consideration of appeals under § 1254(2), this Court reiterated that it has

> consistently distinguished between those cases in which the state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute.

Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S. Ct. 615, 620 (1984). As did *Silkwood*, this case falls into the latter category. The court below did not purport to rule on the constitutionality of any California statute, did not mention any specific California statute, and the parties did not contest or defend the constitutionality of any California statute in their briefs. Thus, California laws were left untouched, as were the Oklahoma laws in *Silkwood* where this Court found that the appeal was not within its § 1254(2) appellate jurisdiction for these very reasons. *Id.* at 621. *See also, Perry Education Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37, 42-43 (1983).

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[5] References in this brief to "Appellants' Appendix" are to Appendix 1 of the Appellants' Jurisdictional Statement, where the court of appeals Amended Decision is reprinted.

The cases cited by appellants in support of their claim that this Court has jurisdiction under 28 U.S.C. § 1254(2) are inapposite. The first three cases cited involve appeals of decisions specifically holding certain state laws or local ordinances unconstitutional either on their faces or as applied. *See Dutton v. Evans*, 400 U.S. 74 (1970); *Watson v. Employers Liability Assurance Corp.*, 384 U.S. 66 (1954); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). The final three cases involve appeals under 28 U.S.C. 1257, which does not apply because this action is not an appeal from the highest court of the State as were those cases. *See McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). Moreover, all of the cases pre-date the *Silkwood* case, which clarifies that this Court does not have jurisdiction under § 1254(2) because no state law has been struck down or invalidated on constitutional or other grounds.

Statutes authorizing appellate jurisdiction, such as § 1254(2), are to be strictly construed. *Perry, supra*, 460 U.S. at 43; *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970). Therefore, the appeal should be dismissed.

II. CONGRESS HAS STUDIED THIS ISSUE AND IS MOVING RAPIDLY TO ENACT LEGISLATION REAFFIRMING THE RIGHT OF TRIBES TO OPERATE BINGO FREE FROM STATE JURISDICTION

This Court has recognized that Congress is better equipped than the judiciary to investigate and study matters involving difficult policy considerations, and that legislative rather than judicial solutions are often preferable in such cases. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 513 (1983); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

Congress has long been recognized as exercising "plenary powers" over Indian affairs. Over the years, Congress has exercised this authority by enacting a broad range of legislation promoting tribal self-government and reservation economic development. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35, and n.17 (1983) (citing numerous federal statutes supporting these goals); *Kerr-McGee Corp. v. Navajo Tribe*, ___ U.S. ___, 105 S. Ct. 1900, 1904 (1985). Congress is now moving rapidly to enact legislation that will regulate tribal gaming activities in general, and promote tribal bingo games in particular.

Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, Representative John McCain (R- Ariz.) and several co-sponsors, introduced H.R. 1920, the Indian Gaming Regulatory Act, on April 2, 1985. 131 Cong. Rec. E1315 (daily ed., April 3, 1985).[6] The House Interior Committee conducted three days of hearings on this and related bills during June, September and November, 1985, including a day of field hearings in California, and, on December 11, 1985, favorably reported the bill, as amended. H.R. 1920, with a further amendment, was passed by the House of Representatives on April 21, 1986 by unanimous consent and sent to the Senate. 131 Cong. Rec. H2012 *et seq.* (daily ed. April 21, 1986). Hearings before the Senate Select Committee on Indian Affairs on H.R. 1920 and S. 902 are presently scheduled for June 17, 1986.

Among the principal objectives of H.R. 1920 is the clearly expressed intention to protect tribal bingo games from state regulation. In the statement of congressional findings in H.R. 1920, it is declared that:

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[6] Companion legislation, S. 902, was introduced in the Senate on April 4, 1985 by Senator DeConcini. 131 Cong. Rec. S4124 (daily ed., April 4, 1985). Senate Committee hearings on this bill were held on June 26, 1985.

> (2) Indian tribes have the exclusive right to regulate gaming activity on Indian lands which is not specifically prohibited by Federal law and which is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity;
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> * * *
>
> (5) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments; and
>
> (6) tribal operation and licensing of gaming activities is a legitimate means of generating revenues.

Appendix at 2a.[7]

In its consideration of H.R. 1920, the House Interior Committee heard from witnesses representing all sides of the Indian bingo question, including the parties in this case. H.R. 1920 represents the considered judgment of the House of Representatives as to the proper balance between the respective rights and interests of the Federal Government, Indian tribes, and the states. As the House Report states:

> H.R. 1920, as amended, is an attempt to meet the concerns of all parties while preserving the

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[7] Although H.R. 1920 has only been passed by the House at this time, in a recent case this Court quoted extensively from the factual record in a Senate Committee Report on legislation that was never enacted. *Walters v. National Association of Radiation Survivors*, ___ U.S. ___, 105 S. Ct. 3180, 3190, n.10 (1985). While the Court reserved judgment on the degree of deference to be accorded to such factual determinations, *id.* at 3194-95, n.12, it is apparent from the opinion that the Court was guided, at least in part, by these congressional findings. We believe that the Court should be similarly guided here, where the findings are based on extensive Committee hearings, the legislation has passed the House, and Senate Committee hearings are pending.

> integrity and rights of tribes to be governed by by their own laws and protecting the right of tribes to generate necessary revenue to support tribal government and programs.

Appendix at 27a. Similar sentiments were expressed at the time that the House passed the legislation. For example, Representative McCain (R-Ariz.), a co-sponsor and a member of the House Interior Committee, stated:

> I rise in support of H.R. 1920, the Indian Gaming Regulatory Act. . . .
>
> * * *
>
> Traditionally, states and Indian tribes have been adversaries, as our committee hearings clearly demonstrated. State witnesses wanted state jurisdiction, regulation, enforcement and taxation. However, no state witness testified that the State had a responsibility to Indian tribes for their health, welfare or economic development.

131 Cong. Rec. H. 2021 (daily ed., April 21, 1986) (statement of Representative McCain).

In addition to this legislative initiative, the Secretary of the Interior has already exercised his regulatory authority over tribal bingo activities. On April 7, 1986, the Assistant Secretary for Indian Affairs distributed to every tribal government in the United States detailed guidelines requiring departmental review and approval of tribal bingo management contracts.[8] A copy of the letter and Interior Department memorandum is attached hereto as Appendix 2. These guidelines require, among other things, an FBI

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[8] These guidelines replace and strengthen an earlier version which had been promulgated on July 20, 1984.

investigation and background check on all non-Indian management personnel, for the express purpose of prohibiting anyone with a criminal background from participating in any tribal bingo enterprise. Appendix at 66a-67a, ¶ 12.

As these facts indicate, both Congress and the Department of the Interior are asserting their oversight responsibilities with respect to tribal bingo. The decision below is consistent with these legislative and administrative actions, obviating the need for the Court to grant plenary consideration in this case.

III. THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION THAT WARRANTS PLENARY REVIEW

A. The Case Presents No Conflicts And Is Consistent With All Federal Court Decisions

Every federal court that has addressed the issue of tribal bingo has upheld the right of tribes to operate bingo games free from state jurisdiction. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of the Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc., 1981); *State of Washington v. Hatch*, C-83-1518R (W.D. Wash., Aug. 14, 1984), *appeal dismissed* (9th Cir., Feb. 21, 1985); *Mashantucket Pequot Tribe v. McGuigan*, Civil No. H-85-210 (D. Conn. Jan. 9, 1986); *Indian Country U.S.A. v. State of Oklahoma*, No. 85-C643-E (N.D. Ok., April 24, 1986). The decision below is consistent with this unbroken line of federal authority and presents no conflict requiring this Court's review.

This Court denied petitions for certiorari in the *Barona* and *Seminole* cases, above, which raised identical questions of law and fact. In addition, this Court dismissed an appeal "for want of a substantial federal question" in *Penobscot Nation v. Stilphen*, (Me.) 461 A.2d 478, *appeal dismissed*,

464 U.S. 923 (1983).[9] Appellees contend, therefore, that this is not a case in which a substantial federal question deserving of this Court's attention is present. This Court concluded that these same issues presented in *Seminole*, *Barona*, and *Penobscot* did not warrant plenary consideration, and appellees believe that nothing has changed either legally or factually to create a need for review by the Court at this time.

Appellants urge this Court to consider this case because an alleged "conflict exists among lower courts concerning this question." Under Rule 17 of this Court, a conflict between the decision of a federal court of appeals and that of the highest court of the state in which the case arose may serve as the grounds for a petition for certiorari to be granted.[10] There is no such conflict in the case presently before the Court, however. Although the California Supreme Court has not ruled on the specific subject of tribal bingo, it has cited with approval and followed the rationale utilized by the Ninth Circuit Court of Appeals in *Barona Group v. Duffy* (and consequently in this case) as to the limits of the state's jurisdiction under P.L. 280. *People, ex rel. Dept. of Transportation v. Naegele*, 211 Cal. Rptr. 247, 254 (1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1260 (1986).

To create an illusion of conflict where none exists, appellants look to the decisions of the Supreme Courts of Maine and Oklahoma in the cases of *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S.

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[9] Although the Maine Supreme Court reached an opposite result, it did so on the basis of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 and Maine legislation implementing that Act. That court recognized specifically that the relationship between Indians in Maine and the State was unlike that which exists anywhere else in the United States and specifically distinguished the *Seminole* and *Barona* cases from its holding.

[10] *See, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974); *Ward v. Illinois*, 431 U.S. 767, 770-771 (1977).

923 (1983); and *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Ok. 1985). Obviously, neither court is the highest court of the State of California; neither case concerns the applicability of California or Riverside County bingo laws; neither cases arises in a P.L. 280 state; and both cases involve states whose relationships with tribes are very different from those of other states in this country. According to the Maine Supreme Court, the relationship between Indians and the State of Maine is "unlike that which exists anywhere else in the United States," 461 A.2d at 488, and "different from the relationship of Indians in other states to the state and federal governments," *id.* at 489, as a result of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. *See also* footnote 9, *supra.* Similarly, Felix Cohen, the most noted commentator on Federal Indian law, devotes an entire section of his *Handbook of Federal Indian Law* to a discussion of the jurisdictional, historical, and legal differences between Oklahoma tribes and those in other areas, classifying Oklahoma Indians as a "Special Group" along with Alaskan and Hawaiian Natives.[11]

It should also be noted that the Oklahoma Supreme Court did not enter a final judgment holding that the state has jurisdiction over tribal bingo games; it specifically reserved judgment on that ultimate question and remanded the case back to the trial court for an evidentiary hearing on the balancing of interests. 711 P.2d at 78, 92. But even in taking this limited action, the court's reasoning is seriously flawed in that it fails to perceive the difference between sovereignty and sovereign immunity, cites cases that have been overturned, and generally takes an unprecedented approach to jurisdiction. The court's analysis is so unpersuasive, in fact, that the U.S. District Court for the Northern District of Oklahoma has recently ruled

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[11] Cohen *Handbook of Federal Indian Law*, 1982 Ed., Michie Bobbs-Merrill, pages 770-797.

in favor of the Creek Indian Nation, and against the State of Oklahoma, in an Indian bingo case, while largely ignoring the reasoning employed by the state court. *Indian Country U.S.A. v. State of Oklahoma, supra.*

Thus, there is absolute unanimity among the many federal district and circuit courts that have considered the tribal bingo question, and the Supreme Court of California has expressly adopted the holdings in these cases as to the limits of the state's jurisdiction under P.L. 280. There is, therefore, no conflict among the lower courts on this question requiring review by this Court.

B. The Decisions in *Rice* and *Bryan* Are Consistent With Each Other And With the Decision in This Case

The appellants claim that it is necessary to review this case because of alleged "uncertainties" in the law caused by earlier decisions of this Court. However, the decisions in *Rice v. Rehner*, 463 U.S. 713 (1983) and *Bryan v. Itasca County*, 426 U.S. 373 (1976) do not conflict with each other and cause no uncertainty or confusion except in the minds of those who would misread them, as do appellants herein.

Bryan v. Itasca County is the seminal case interpreting Public Law 83-280, 67 Stat. 588 (1953) a statute not in question or reviewed in *Rice*. The Court in *Bryan* reviewed the language and legislative history of P.L. 280 and concluded that P.L. 280 granted the states criminal jurisdiction over the reservation and civil jurisdiction in State courts to adjudicate private civil causes of action involving Indians. The Court held that beyond these specific grants of authority, the law with regard to reservation Indians remained unchanged. 426 U.S. at 391.[12] And, perhaps most

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[12] The appellants incorrectly claim that P.L. 280 was generally intended to broaden state jurisdiction over Indians. Based on this Court's review of the legislative history, there is nothing to lend support to that conclusion. This Court itself noted that there would be a "devastating impact on tribal governments" were P.L. 280 interpreted to

important, *Bryan* held that "there is notably absent any conferral of state jurisdiction over the tribes themselves." 426 U.S. at 391. It is just such jurisdiction which the state seeks to assert in the instant case, namely: jurisdiction to prevent the tribes themselves from operating their tribal bingo games.

Moreover, it was in the *Bryan* case that this Court concluded that nothing in P.L. 280 was intended to subject reservation Indians to the "full panoply of civil regulatory powers . . . of state and local governments" for to do so would turn the tribes into little more than "private, voluntary organizations." *Bryan*, 426 U.S. at 389.[13]

In contrast, *Rice v. Rehner* involved the interpretation of 18 U.S.C. § 1161, a statute not involved in the present case and far different from P.L. 280. The appellants claim that these two cases are confusing on the basis of footnote 18 in *Rice* , which states that this Court is reluctant to make a distinction between "substantive" and "regulatory" laws in the "absence of a context that might possibly require it." 426 U.S. at 734, n.18. The Court immediately continues the same footnote by distinguishing the *Bryan* case, to point out that *Bryan* is the type of case which calls for such distinctions to be made.[14] Reviewing *Bryan*,

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give state and local governments "general civil regulatory control over reservation Indians," 426 U.S. at 388, n.14, citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). The *Santa Rosa* court had found that such a result "would significantly undermine, if not destroy such tribal self-government." 532 F.2d at 662.

[13] The appellants argue that the distinction between civil regulatory and criminal laws was dictum because they claim that the tax laws involved in *Bryan* were not regulatory. Contrary to their claim, this Court specifically refers, at 426 U.S. 389, to "civil regulatory powers, including taxation," meaning that taxation was one of the civil regulatory powers over which the states did not acquire jurisdiction.

[14] The footnote says "*Cf. Bryan* . . ." The abbreviation "cf." commonly means "compare," indicating that a distinction is to be made.

which was cited with approval in the *Rice* decision, one sees that the distinction drawn between "civil regulatory" law and "criminal" law therein is significantly different from the type of distinction viewed with disfavor in footnote 18. In *Bryan*, the Court was confronted with interpreting a Congressional enactment, P.L. 280, which on its face divided laws into criminal and civil categories. This Court concluded from the legislative history that Congress did not intend to subject Indians to the general civil regulatory laws of a state, but rather intended only that the judicial forums of the state would be open to reservation Indians and the state decisional laws would apply to those controversies.

Clearly, this situation is far different from the distinction between substantive and procedural laws which was urged in *Rice* and which the Court rejected because there was no legislative language or history to support such an interpretation. In a long line of cases stretching over the past decade, the various circuit courts of appeals have utilized this civil regulatory/criminal distinction and this Court has never found it necessary to review or overturn their decisions. *See, e.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

Even the House of Representatives endorsed the approach taken by the Ninth Circuit in the case presently before this Court. In structuring its legislation, it cited the decision with approval, and utilized the same criminal/civil regulatory approach approved in this case. Significantly, the House Committee Report also stated that *Rice* was not adopting a new doctrine by which to measure the extent of state power in Indian country and was not creating a new theory of Indian sovereignty. Appendix at 26a. Both are indications that Congress itself agrees that

P.L. 280 was intended to apply only criminal prohibitory laws to Indian reservations, not state laws like those at issue here which permit and regulate the playing of bingo. Thus, it is apparent that there is no conflict with respect to federal court decisions concerning tribal authority to operate bingo games and *Bryan*, on the one hand, and *Rice v. Rehner* on the other.

C. California's Public Policy With Respect to Bingo Does Not Raise a Substantial Federal Question Warranting Further Review

In holding that neither P.L. 280 nor the Organized Crime Control Act, 18 U.S.C. § 1955, grants jurisdiction to the State or County to apply their bingo laws on the reservation, the court of appeals found that bingo was not contrary to the public policy of California. Appellants' Appendix at A-4-6. In *Barona*, the court of appeals had recognized that California permits an almost unlimited variety of groups and organizations to sponsor bingo,[15] and that the uses of tribal bingo proceeds were "as worthy as the other charitable purposes to which bingo proceeds are lawfully authorized under the California statute." 694 F.2d at 1190.[16] In reliance on *Barona* and the 5th Circuit's earlier decision in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) *cert. denied*, 455 U.S. 1020 (1982), the court below held that bingo was not violative of California's public policy.

The State's more general argument that commercial gambling is contrary to California's public policy also rings somewhat hollow in light of the fact that Californians are

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[15] Under California law, fraternal organizations, senior citizens groups, mobile home associations, labor and agricultural groups, recreational clubs, real estate boards and a host of entities other than Indian tribes may conduct bingo games.

[16] As in the *Barona* case, both the Cabazon and Morongo tribal bingo ordinances require that bingo proceeds be used to promote the health, education and general welfare of the tribes and their members.

betting *$8.6 million per day* on the new State Lottery; that Californians bet more than *$2 billion* in 1982 on horse races; and that there are over 400 public poker casinos throughout the state where card players can win or lose unlimited amounts of money.[17]

The question of California's public policy with respect to bingo is, of course, a matter requiring interpretation and application of state law. On such questions, this Court has historically shown substantial deference to the decisions of district and circuit court judges, "who are familiar with the intricacies and trends of local law and practice." *Bishop v. Wood*, 426 U.S. 341, 346 and n.10 (1975); *see also, United States v. Varig Airlines*, 467 U.S. 797, 815, n.12 (1984); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181, n.11 (1979). While this Court may, on occasion, reverse lower court interpretations of state law, it does so only when the decision below is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable." *Propper v. Clark*, 337 U.S. 472, 487 (1949).

In this instance, the decision below was both correct and reasonable. Bingo is permitted and widely played throughout California. The State's effort to distinguish tribal bingo (which it erroneously characterizes as "commercial gambling") from other bingo games (which it characterizes as "charitable" bingo) is both misleading and unwarranted. The State quotes briefly from the Report of the National Gambling Review Commission to the effect that bingo can be abused by unscrupulous operators. Jurisdictional Statement at 18. But the State fails to note that the same Report expressly *rejected* a functional distinction between "commercial" and "charitable" bingo:

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[17] The city of Gardena, California proudly bills itself as "The Poker Capital of the World." Supplemental Excerpt of Record at 7.

> The Commission perceives little difference between "charitable bingo" and commercial bingo. Charitable bingo . . . is sponsored by statutorily sanctioned organizations such as churches and service clubs. It is operated, however, like a commercial operation. . . . The Commission's survey has found that people play charitable bingo for the same reasons they might participate in commercial bingo: Bingo provides entertainment and a chance to make money. The charitable aspects of the game are relatively unimportant.

Excerpt of Record at 183-84.

Two different panels of the Ninth Circuit have now concluded that tribal bingo games are not contrary to California's public policy. This determination, based on state law considerations, is reasonable and not a significant federal question which warrants plenary review by this Court.

IV. THE COURT OF APPEALS CONDUCTED A PARTICULARIZED INQUIRY AND REACHED THE CORRECT RESULT

Like the other federal courts that have sanctioned tribal bingo games, the court below concluded that neither P.L. 280 nor the Organized Crime Control Act authorized the exercise of state jurisdiction over these tribal activities. In addition, however, the Ninth Circuit went even further in the present case and conducted a "particularized inquiry" into the respective federal, tribal and state interests involved. In so doing, the Court was applying an accepted method of analysis, although one which is usually used when the regulation of non-Indians is at issue. *See, e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).

Under this analysis, the Court has repeatedly recognized two independent barriers to state jurisdiction over activ-

ities on Indian reservations: preemption by federal law or infringement on the right of tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. After carefully analyzing and balancing the respective interests at issue, the court below concluded that the federal and tribal interests clearly outweighed the state interest, and that assertion of state and local jurisdiction over tribally conducted bingo games would impermissibly infringe on the tribes' right of self-government. Appellants' Appendix at A-11.

The only interest asserted by the State of California in this case is in protecting against "the *potential* for intrusion of organized crime" into these games. Appellants' Appendix at A-10 (emphasis in original). As the Ninth Circuit correctly found, there is no evidence whatsoever that organized crime exists on these Indian reservations. *Id.* at A-8. In fact, the State and County stipulated to this fact in the district court. After extensive hearings, including field hearings in California, the House Interior Committee likewise found no evidence of organized crime involvement in tribal bingo games. Appendix at 24a-25a. The state also fails to recognize that both the tribes and the Federal Government share a substantial interest in keeping the tribal bingo games free from criminal involvement.

The appellants claim, without any basis whatsoever, that the tribes are incapable of controlling activities on their reservations.[18] The Morongo Band terminated one bingo operation with which it was dissatisfied and successfully brought action in federal court to terminate another bingo operating in violation of its tribal bingo ordinance. The Cabazon Band has a tribal security force and a tribal court through which it controls activities on its reservation. Thus,

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[18] The Court has recently rejected a similar argument in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342, n.27 (1983).

both tribes have the capability of controlling activities within their jurisdiction.

In addition, the Federal Government has a substantial array of resources which it can bring to bear against illegal gambling on Indian reservations. *See, e.g.*, 15 U.S.C. § 1171-75, 18 U.S.C. § 1955. The United States has shown no reluctance to use them in appropriate cases. *See United States v. Farris*, 624 F.2d 890 (9th Cir.) *cert. denied*, 419 U.S. 1111 (1980); *United States v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 364 F. Supp. 192 (D. Mont. 1973). Therefore, the lower court's holding that the state's interest, while legitimate, did not outweigh the countervailing federal and tribal interests is plainly supported by the applicable legal principles and the particular facts of this case.

A. The Federal Interests Involved Here Weigh Heavily In Support of the Tribe's Position

In balancing the federal, tribal and state interests involved here, the court of appeals correctly placed substantial weight on the fact that the United States Department of the Interior strongly supports tribal bingo as a legitimate means of raising tribal revenues and providing reservation employment opportunities. Appellants' Appendix at A-8-9. Within the Executive Branch, the Interior Department and its personnel are statutorily charged with the responsibility for formulating Indian policy and managing Indian affairs. *See, e.g.*, 25 U.S.C. § 1, 1a, 2, 13. Therefore, the views of the Department of the Interior in such matters are entitled to great weight and substantial deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

In finding that the interests of the federal government support the tribes' position in this case, the court of appeals noted both the recent federal statutes that promote reservation economic development, Appellants' Appendix at A-8, and President Reagan's Indian Policy Statement of January 24, 1983, calling on tribes to "reduce their de-

pendence on federal funds by providing a greater percentage of the cost of their self-government." *Id*; *see Kerr-McGee Corp. v. Navajo Tribe*, ___ U.S. ___, 105 S. Ct. 1900, 1904 (1985). Beyond these, the court of appeals also had before it, and quoted from, a March 2, 1983 directive from the Assistant Secretary of the Interior which stated that efforts to subject tribal bingo to state jurisdiction would be "strongly opposed" as inconsistent with federal Indian policy, and stating, instead, that these tribal bingo ventures should be "protected and enhanced" by the federal government. Appellants' Appendix at A-8-9. In addition, the Director of Indian Services, Bureau of Indian Affairs, had submitted an affidavit on behalf of the Cabazon and Morongo Bands in the district court, which stated quite clearly that tribal bingo games were an approved means by which tribes could generate necessary revenues. *Id.* at A-9. The affidavit continued:

> We recognize that the limitations of federal funding for tribal governments has been the impetus for many tribes to seek alternative sources of the revenue they need in order to provide governmental services to their people. A number of tribes have turned to bingo enterprises to supply that revenue just as many states have instituted state-run lotteries for the same purpose.[19]

Declaration of Theodore Krenzke, Excerpt of Record at 525.

The Interior Department's position on this question has remained consistent. In testimony before the House Interior Committee on November 14, 1985 concerning H.R. 1920, the Interior Department witness stated:

> Indian reservation gambling provides economic benefit to many of the tribes involved, especially

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[19] California is, of course, one such state.

> those with no valuable natural resources or other significant sources of income.
>
> * * *
>
> We oppose State control over bingo because it would drive Indian bingo out of business by subjecting it to the days, hours, prize and other restrictions of the States.
>
> * * *
>
> We believe that the law enforcement risks involved with bingo are manageable and do not warrant State regulation.

Testimony of Marian Blank Horn, Principal Deputy Solicitor, Department of the Interior, November 14, 1985.[20]

The court of appeals, therefore, was certainly correct in holding that the federal interest in promoting tribal bingo weighs heavily in support of the tribes' position in this case and against state jurisdiction over tribal bingo games.

B. The Tribes Are Not "Marketing An Exemption"

The Court below also carefully considered and then rejected the appellants' argument that the tribes' interest in generating revenues for governmental programs and services from bingo is weak because the tribes are allegedly "marketing an exemption" from state law. In rejecting this contention, the court of appeals applied the teachings of this Court to the particular facts of this case, and reached the appropriate result.

In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Court had permitted

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[20] The United States Department of Justice also testified before the House Interior Committee on November 14, 1985, to state that "an Indian gambling policy . . . has been agreed upon by the Department of the Interior and Justice." A key element of that policy was that tribal bingo activities would continue to be regulated by the Federal Government, and not subject to state jurisdiction.

the State of Washington to impose a concurrent state cigarette tax, in addition to the tribal tax, on cigarettes sold to non-tribal members. In assessing the respective revenue interests of the tribe and the state, the Court recognized that while both were legitimate,

> [the tribal] interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services .... [The state's] interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-57. In *Colville*, the Court found the tribal revenue interest weak because the activity involved "off-reservation value."

In the present case, however, quite the opposite is true. As the court below noted, even the appellants in this case concede that "the revenues here are derived from value generated by on-reservation activities. . . . Appellants' Brief at 28, n.11." Appellants' Appendix at A-10. In addition, the appellants here are not asserting any revenue interest at all in the tribal bingo games. As a result, the Court below was correct in finding that the tribes' revenue interests in these activities were strong, and entitled to substantial weight in its "particularized inquiry" analysis.

The situation presented by this case is far more analogous to *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) than to *Colville*. In *New Mexico*, the Court recognized that concurrent state regulatory jurisdiction would effectively nullify tribal jurisdiction and would "threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 341. This concern is even more compelling here, given the position of both Congress and the Department of the Interior that tribal bingo is an important and legitimate

means by which tribes must replace dwindling federal funds, and the fact that the State would not merely regulate but entirely prohibit such games.

In sum, the tribes here are providing on-reservation recreational activities, to which they have made substantial contributions of resources and services, and from which they derive necessary tribal revenues and provide on-reservation employment opportunities. The state has no countervailing revenue interest in the activities, and provides no on-reservation services to the bingo players that would justify concurrent regulatory authority. *New Mexico*, 462 U.S. at 341. As a result, the present case is likewise "far removed" *id.*, from the *Colville* situation and the court of appeals was correct in according substantial weight to the tribes' revenue interests in the tribal bingo games.

C. The Tribes Have a Tradition Of Self-Government With Respect to Gaming

The appellants argue that the court of appeals failed to properly analyze the question of "tribal tradition" with respect to the activities at issue here. They contend that there is no tribal "tradition" of commercial gaming on these reservations, and that absent such a tradition the State is authorized to regulate these tribal activities. The State's argument is wrong both as a matter of fact and of law.

According to Dr. Lowell Bean, the leading anthropological expert on Câhuilla Indians and a declarant witness in this case, the Indians of the Morongo and Cabazon tribes:

> have engaged in gambling for both public and private benefit, provided time and space under the direction and control of tribal leaders for gambling purposes, and have encouraged Indians of other tribes and in historic times, persons of other cultures and races . . . to participate in gambling endeavors.

* * *

> Traditional gambling techniques have continued among these people from time immemorial until the present. Gambling has at no time in the history of the Cahuilla peoples ceased as a significant activity, including today.

* * *

> [Tribal gamblers] received an extraordinary amount of money for these activities and, in fact, refused—and still refuse—to engage in gambling without wagers of significant amounts of money .... The time and places where gambling was engaged in were controlled, sanctified and protected by traditional leaders of Indian communities ... . [T]he sponsoring community did indeed receive monies and/or goods for services provided to visitors or participants who came to gamble, wager, or observe gaming.... After Indians began to deal socially and economically with non-Indians throughout the Spanish, Mexican and American periods, non-Indians were encouraged to come to [gamble].

Declaration of and Report by Lowell John Bean, Excerpt of Record at 476, 478, 479, 481.

Dr. Bean concludes from his nearly 30 years of research on these Indians and his many years of living on the Morongo Reservation that:

> As an anthropologist, I see the presence of the Tribal Bingo enterprises on the Morongo and Cabazon Reservations as being a present day adaptation of the traditional ways of the Cahuilla people, *e.g.*, the use of tribal lands for gaming, recreation, and generating an income from gambling and spending by outsiders for the benefit of the reservation.

Id. at 476-77.

Although the above-quoted record fully supports a finding of a tribal tradition of sponsoring gaming to raise funds for the tribes' benefit, the tribes contend that it was not this Court's intention in *Rice* to scrutinize the historical record concerning the precise activity involved and the specific traditions relating thereto. Rather, the tribes believe that the Court was determining whether there was a legal tradition of self-government over the subject area in question and whether the activity sought to be controlled was an area of traditional governmental regulation which was left to the tribes.

In *Rice*, this Court was specifically called upon to interpret 18 U.S.C. § 1161, which provides that liquor may be sold on the reservations "in conformity with the laws of the state . . . and with [a tribal ordinance]." Reviewing that statutory language, this Court determined that there had been a congressional delegation to the state of concurrent regulatory authority. It is in that context that the notion of tribal tradition took on importance because this Court found that there was no legal tradition of tribal self-government in the area of alcohol regulation. The Court stated that

> [a]lthough in Indian matters Congress usually acts "upon the assumption that the States have no power to regulate the affairs of Indians on a reservation" . . . that assumption would be unwarranted in the narrow context of the regulation of liquor.

Rice, 463 U.S. at 723. To reach this conclusion, the Court traced the legal history of both federal and state regulation of liquor on Indian reservations, *id*, and determined that "there can be no doubt that Congress has divested the Indians of inherent power to regulate in this area." *Id.* at 724.

The tradition of tribal self-government is far different with regard to gaming. According to the House Report on H.R. 1920:

> There are vast historical differences in the manner that the United States has treated alcohol and gaming activities in Indian country. Except for a prohibition against the operation of mechanical devices such as slot machines, the federal government has never attempted to prohibit or regulate gambling activity within Indian country. In like manner there is no specific or general Federal law conferring authority on States to regulate gaming activity within Indian country.

Appendix at 26a. Thus, the facts here are the opposite of those in *Rice* where liquor regulation had been controlled by the states since colonial times. The historical lack of any state control of reservation gaming justifies the Ninth Circuit's conclusion that there is a tradition of self-government with regard to gaming activities such as those at issue herein.

The appellants read *Rice* far too narrowly in arguing that unless a given tribe can demonstrate through historical or anthropological evidence that it has "traditionally" engaged in a particular activity, a state can exercise regulatory jurisdiction over such on-reservation tribal conduct. Were the appellants to prevail with this argument, every case involving tribal jurisdiction would be reduced to a battle of anthropological experts, quibbling over historical minutia. And, more important, such an approach would require each issue to be litigated tribe by tribe across the country for, despite some similarities, the tribes have varied cultures and traditions.

Federal and state courts have routinely upheld the rights of tribal governments to regulate activities that Indian tribes have not engaged in "traditionally." *Red Lake Band of Chippewa Indians v. Minnesota*, 248 NW.2d 722 (1976)

(vehicle registration); *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981) (air quality regulation); *Knight v. Cheyenne Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (zoning); *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (automobile repossession). They have done so because Indian tribes are governments and as the court below noted, these are "traditional governmental functions," Appellants' Appendix at A-11.

Indian cultures, like all cultures, evolve and develop. The position advanced by the State here would permanently lock Indian people into the role of subsistence farmers and dip net fishermen, living in hogans and selling baskets by the side of the road. This "traditional" Indian existence for which the State argues is clearly contrary to the twin goals of current federal Indian policy: promoting tribal self-government and fostering successful reservation economic development. In this case, the tribes are raising needed tribal revenues through activities which are regulated by the tribal governments, permitted by the state, and sanctioned by the Federal Government. Under these circumstances, the court of appeals was correct in holding that the assertion of state regulatory jurisdiction over this traditional governmental function would unlawfully infringe on the tribes' right of self-government.

CONCLUSION

In *Santa Rosa v. Kings County*, *supra*, the court of appeals stated that subjecting Indian communities to civil regulatory jurisdiction of state or local governments would "dilute if not altogether eliminate Indian political control of the . . . development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian" communities who "may not share the usually poorer Indian's priorities, or may in fact be in economic competition" with them. 532 F.2d at 664.

The court went on to say: "there may inevitably be some abrasion between Indian communities and local neighbors. That, however, does not dictate eliminating Indian jurisdiction." *Id.*

Because state jurisdiction over reservations is strongly disfavored, *Bryan, supra*, 426 U.S. at 376, n.2; because ambiguities in statutes concerning Indian tribes are to be resolved in favor of the Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, n.17 (1978), and for the reasons stated above, the Morongo and Cabazon Bands of Mission Indians urge this Court to let stand the court of appeals decision in this case by dismissing the appeal for lack of jurisdiction and denying the resultant petition for writ of certiorari, or affirming the judgment below.

Respectfully submitted,

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Dated: May 19, 1986

APPENDIX

APPELLEES' APPENDIX 1

99TH CONGRESS | HOUSE OF REPRESENTATIVES | REPORT
2d Session | 99-448

ESTABLISHING FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES

MARCH 10, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the committee on Interior and Insular Affairs,
submitted the following

REPORT

together with

SUPPLEMENTAL AND DISSENTING VIEWS

[To accompany H.R. 1920]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 1920) to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following in lieu thereof:
That this Act may be cited as the "Indian Gaming Regulatory Act".

SEC. 2. (a) The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Indian tribes have the exclusive right to regulate gaming activity on Indian lands which is not specifically prohibited by Federal law and which is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity;

(3) there are no existing statutes which require approval of management contracts dealing with Indian gaming;

(4) existing Federal law does not provide clear standards or regulations necessary to insure the orderly conduct of gaming activities on Indian lands;

(5) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(6) tribal operation and licensing of gaming activites is a legitimate means of generating revenues.

(b) The Congress declares that the establishment of Federal standards for gaming activity on Indian lands and a National Indian Gaming Commission are necessary to meet the concerns regarding gaming activities and to protect such activities as a means of generating tribal revenue.

SEC. 3. (a) Except as provided in subsection (b), Class II and III gaming regulated by this Act shall be unlawful on any lands acquired by the Secretary, under any existing authority, in trust for the benefit of any Indian tribe after

December 4, 1985, if such lands are located outside the boundaries of such tribe's reservation.

(b) Subsection (a) shall not apply if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the Governor of the State, the State legislature, and the governing bodies of the county and municipality in which such lands are located.

SEC. 4. Provisions of the Internal Revenue Code of 1954, as amended, concerning the taxation and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations.

SEC. 5. (a) There is established within the Department of the Interior an independent commission to be known as the National Indian Gaming Commission.

(b)(1) The Commission shall be composed of eight members as follows:

(A) a Chairman who shall serve full-time and who shall be appointed by, and serve at the pleasure of, the Secretary;

(B) a member to be selected by the Attorney General and appointed by the Secretary;

(C) five members, at least three of whom shall be enrolled members of Federally recognized tribes, to be appointed by the Secretary from a list of not less than ten nor more than twenty candidates submitted and approved by a majority of the tribes then engaged in or regulating gaming activities; and

(D) one member appointed by the Secretary after consultation with appropriate organizations or entities, who shall represent the interest of the States.

(2) Not more than four members of the Commission shall be of the same political party.

(3)(A) Except for the Chairman and except as otherwise provided in this paragraph, members shall be appointed for terms of three years.

(B) Of the members first appointed—

(i) the member appointed pursuant to paragraph (1)(B) and two of the members appointed pursuant to paragraph (1)(C) shall be appointed for a term of two years; and

(ii) the remaining members appointed pursuant to paragraph (1)(C) and (1)(D) shall be appointed for a term of three years.

(4) Any individual who—

(A) has been convicted of a felony or gaming offense;

(B) has any management responsibility in any gaming activity regulated pursuant to this Act; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act shall not be eligible for appointment to, or to continue service on, the Commission.

(5) Except for the Chairman, a member of the Commission may be removed for good cause by a majority vote of the remaining members subject to the approval of the Secretary or, in the case of a member appointed pursuant to paragraph (1)(B), the Attorney General.

(c)(1) Vacancies occurring on the Commission as a result of the expiration of the terms of appointment shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term until his successor has been appointed.

(2) Other vacancies occurring on the Commission shall be filled by a majority vote of the Commission and members so appointed shall serve the remainder of the terms for which his predecessor was appointed.

(d) Five members of the Commission shall constitute a quorum.

(e) The Commission shall select, by majority vote, one of the members to serve as Vice-Chairman who shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) The Commission shall meet at the call of the Chairman or a majority of its members.

(g)(1) The Chairman of the Commission may be paid at a rate equal to that of Level V of the Executive Schedule (5 U.S.C. 5316).

(2) Except as provided in paragraph (3), the other members of the Commission may each be paid at a rate equal to the daily equivalent of the maximum annual rate of basic pay in effect for grade GS-18 of the General Schedule (5 U.S.C. 5332) for each day, including travel time, during which they are engaged in the actual performance of duties vested in the Commission.

(3) Members of the Commission who are full-time officers or employees of the United States shall receive no additional pay by reason of their service on the Commission.

(4) All members may be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

SEC. 6 (a) The Chairman of the Commission shall have the exclusive power—

(1) to approve tribal ordinances or resolutions regulating Class II gaming as provided in section 11(b);

(2) to approve management contracts for Class II and III gaming as provided in section 12; and

(3) to select, appoint, and supervise the staff of the Commission as provided in section 8.

(b) The Chairman shall have power, subject to the approval of the Commission—

(1) to appoint a General Counsel of the Commission;

(2) to promulgate regulatory schemes for Class III gaming as provided in section 11(c); and

(3) to issue orders of temporary closure of gaming activities as provided in section 14(b).

(c) The Chairman shall have power, subject to an appeal to the Commission—

(1) to approve or disapprove tribal ordinances or resolutions and licenses for Class III gaming as provided in section 11(c); and

(2) to levy and collect civil fines as provided in section 14(a).

(d) The Chairman shall have such other powers as may be delegated by the Commission.

SEC. 7. (a) The Commission shall have specific power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 17;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by a vote of not less than five members, to adopt the annual assessment as provided in section 17;

(4) by a vote of not less than five members, to authorize the Chairman to issue subpoenas as provided in section 15; and

(5) by a vote of not less than five members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b).

(b) The Commission shall have power—

(1) to monitor Indian gaming activities on a continuing basis;

(2) to inspect and examine all premises where Indian gaming is conducted;

(3) to conduct or cause to be conducted such background investigations as may be necessary;

(4) to demand access to and inspect, examine, photocopy, and audit all papers, books, records respecting gross income of a gaming activity and all other matters necessary to the enforcement of this Act;

(5) to use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States;

(6) to procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) to enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission;

(8) to hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) to administer oaths or affirmations to witnesses appearing before the Commission; and

(10) to establish and implement such other standards, guidelines, and regulations as it deems appropriate not inconsistent with this Act and other applicable law.

SEC. 8. (a) The Chairman, with the approval of the Commission, shall appoint a General Counsel to the Commission who shall have a background in Indian affairs. The General Counsel may be paid at the annual rate of basic

pay payable for GS-18 of the General Schedule (5 U.S.C. 5332).

(b) The Chairman shall appoint other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) The Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimburseable basis such administrative support services as the Commission may request.

SEC. 9. The Commission may secure directly from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

SEC. 10. The Secretary shall promptly appoint the members of the Commission, as provided in section 5 of this Act, and shall provide staff and support assistance to en-

able the Commission to meet and organize as soon as practicable thereafter.

SEC. 11. (a)(1) Class I gaming shall be within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2)(A) Except as provided in subparagraph (B) and (C), Indian tribes may engage in, or license and regulate, Class II or Class III gaming activity on Indian lands if the governing body of the Indian tribe adopts an ordinance or resolution to that effect which is approved by the Commission pursuant to subsection (b) or (c) of this section. Licenses are required for each place, facility, or location of Class II or Class III gaming activities.

(B) Subparagraph (A) shall not apply with respect to an Indian tribe if—

(i) a gaming activity is specifically prohibited on Indian lands by Federal law; or

(ii) such gaming activity is prohibited by the State within which such tribe is located as a matter of State public policy and criminal law.

(C) Subparagraph (A) shall not apply to gaming on Indian lands located within the State of Nevada.

(b)(1) An Indian tribe may engage in, or license and regulate, Class II gaming activity on the Indian lands of such tribe if the governing body of the tribe adopts an ordinance or resolution which is approved by the Chairman.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, licensing, or regulation of Class II gaming activity on the Indian lands of such tribe if such ordinance or resolution provides that—

(A) except as provided in paragraph (3), the Indian tribe itself shall have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming activity are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

Provided, That, if such net revenues are directly or indirectly used for per capita payments to tribal members, those payments are subject to Federal tax.

(C) annual outside independent audits of the gaming activity will be obtained by the Indian tribe and made available to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually, except contracts for professional legal or accounting services, relating to such gaming activity shall be subject to such independent audits; and

(E) the construction and maintenance of the gaming facility, and the operation of that gaming activity, is conducted in a manner which adequately protects the environment and the public health and safety.

(3) A tribal ordinance or resolution may provide for the licensing or regulation of Class II gaming activities owned by individuals or entities other than the Indian tribe, except that the tribal licensing requirements shall be at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such tribe is located. No individual or entity, other than the tribe, shall be eligible to receive a tribal license to own a Class II gaming activity within the tribe's ju-

risdiction if such individual or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(4) Not later than one hundred and sixty days after the submission of any tribal gaming ordinance or resolution, the Chairman shall approve such ordinance or resolution if it meets the requirements of this subsection. Any such ordinance or resolution not acted upon at the end of that one hundred and sixty day period shall be deemed to have been approved by the Chairman.

(c)(1) An Indian tribe may engage in, or license and regulate, Class III gaming activity on the Indian lands of such tribe if the governing body of the tribe adopts an ordinance or resolution which meets the requirements of this subsection and which is approved by the Chairman.

(2) The Commission shall adopt comprehensive gaming regulations for Class III gaming. Such regulations shall be identical to that provided for the same or similar gaming activity by the State within which such Indian gaming activity is to be conducted.

(3) Where any State law or regulation adopted by the Commission pursuant to paragraph (2) involve criminal penalties for violation thereof, such criminal penalties shall be enforceable by—

(A) the State where such State has the requisite criminal jurisdiction over Indian reservations pursuant to Public Law 83-280, or

(B) by the United States pursuant to the Assimilative Crimes Act (18 U.S.C. 13),

as if such criminal penalties were part of the criminal/prohibitory laws of such State.

(4) The Chairman shall approve a tribal ordinance or resolution relating to the conduct of Class III gaming activity and shall issue a license to engage in such activity

if the ordinance or resolution meets the requirements of subsection (b)(2) and (3) of this section and conforms to the regulations adopted by the Commission pursuant to paragraph (2) of this subsection.

(5) Prior to approving a license pursuant to this subsection, the Chairman shall prepare and take into consideration an analysis of the prospects for the proposed gaming activity to operate in a profitable and economically sound manner. The analysis shall, as a minimum, include:

(A) a summary of the capital outlays needed to begin operations and the long-term financing requirements;

(B) the financing method and proof of availability of financing;

(C) the impact of granting a license on both the tribal and nearby non-Indian communities; and

(D) the ability of the licensee to monitor and insure that gaming operations are conducted in a fair and safe manner.

SEC.12. (a) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a Class II or III gaming activity, except that, before approving such contract, the Chairman shall require and obtain the following information:

(1) The name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a financial interest in, or management responsibility for, such contract, or, in the case of a corporation, those individuals who serve on the Board of Directors of such corporation and each of its stockholders who hold (directly or indirectly) ten percent or more of its issued and outstanding stock;

(2) a description of any previous experience which each person listed pursuant to paragraph (1) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had contact relating to gaming; and

(3) a complete financial statement of each person listed pursuant to paragraph (1).

(b) Any management contract entered into pursuant to this section shall specifically provide—

(1) that adequate accounting procedures are maintained and that verifiable financial reports are prepared by or provided to the tribal governing body on a monthly basis;

(2) that appropriate tribal officials shall have reasonable access to the daily operations of the gaming activity and shall have the right to verify the daily income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) that the term of the contract shall not exceed five years; and

(6) for grounds and mechanisms for terminating such contract; *Provided,* That contract termination shall not require the approval of the Commission.

(c) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if he determines that such percentage fee is reasonable in light of surrounding circumstances, but in no event shall such fee exceed forty percent of the net revenues.

(d) Not later than one hundred and twenty days after the submission of a contract, the Chairman shall approve or disapprove such contract on its merits. Any such contract not acted upon at the end of such time shall be deemed to have been approved by the Chairman.

(e)The Chairman shall not approve any contract where he determines that:

(1) any person listed pursuant to paragraph (a)(1) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statement or information to the Commission or the tribe pursuant to this Act; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance

or resolution adopted and approved pursuant to this Act, or

(4) a trustee exercising the skill and diligence that a trustee is commonly held to would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) No management contract for the operation and management of a Class II and III gaming activity shall transfer or, in any other manner, convey any interest in land or other real property unless clearly specified in writing in said contract.

SEC. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing Class II or III gaming or entered into a management contract, that such ordinance, resolution, or contract must be submitted for his review within sixty days of such notification.

(b)(1) Within ninety days after the submission of an ordinance or resolution authorizing Class II gaming pursuant to subsection (a), the Chairman shall review such ordinance to determine if it conforms to the requirement of section 1(b) of this Act.

(2) If he determines that such ordinance or resolution conforms to section 11(b), he shall approve it.

(3) If he determines that such ordinance or resolution does not conform to the requirements of section 11(b), he shall provide written notification of necessary modifications to the Indian tribe which shall have not more than one hundred and twenty days to come into compliance.

(c)(1) Within ninety days after the adoption by the Commission of a Class III regulatory scheme governing the type of gaming involved in a Class III ordinance or resolution submitted pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to such regulatory scheme and the appropriate requirements of section 11(b) of this Act.

(2) If he determines that such ordinance or resolution conforms to such regulatory scheme and to the requirements of section 11(b), he shall approve it and issue any necessary license.

(3) If he determines that such ordinance or resolution does not conform to such regulatory scheme and to the requirements of section 11(b), he shall provide written notification of necessary modification to the Indian tribe which shall have not more than one hundred and twenty days to come into compliance.

(d)(1) Within one hundred and eighty days after the submission of a management contract pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12 of this Act.

(2) If he determines, at the end of such period, that such contract and the management contractor meet the requirements of section 12, he shall provide written notification to the parties to such contract of modifications necessary to come into compliance and the parties shall have not more than one hundred and twenty days to come into compliance.

(4) Where a management contract submitted pursuant to subsection (a) has been previously approved by the Secretary or his representative, said contract shall be deemed in compliance hereof and no further action shall be required.

SEC. 14. (a)(1) The Commission shall have authority to authorize the Chairman to levy and collect appropriate civil

fines, not to exceed $10,000 per violation, against an Indian gaming activity or a management contractor engaged in gaming activities regulated by this Act or by regulations adopted by the Commission pursuant to this Act.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(b)(1) The Chairman shall have power to order temporary closure of Indian gaming activities for substantial violation of the provisions of this Act or regulations adopted by the Commission pursuant to this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. The Commission may, by a vote of not less than five of its members, order a permanent closure of the gaming operation after such hearing.

(c) A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal District Court pursuant to the Administrative Procedures Act, title 5, United States Code.

SEC. 15. (a)(1) The Commission may authorize the Chairman to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter which the Commission is empowered to investigate by this Act.

(2) Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States.

(3) If a person issued a subpoena under paragraph (1) refuses to obey such subpoena or is guilty of contumacy,

any court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may, upon application of the Commission, order such person to appear before the Commission to produce evidence or to give testimony relating to the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) The subpoenas of the Commission shall be served in the manner provided for subpoenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(5) All process of any court to which application may be made under this section may be served in the judicial district in which the person required to be served resides or may be found.

(b) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to a subpoena, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture by reason of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 16. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission may, when such information indicates a violation of Federal, State, or tribal criminal statutes or ordinances, provide such information to the appropriate law enforcement officials.

(c) The Attorney General of the United States is authorized to investigate activities associated with gaming authorized by this Act which may be a violation of Federal law, including but not limited to the Major Crimes Act (18 U.S.C. 1153), the Assimilative Crimes Act (18 U.S.C. 13), and 18 U.S.C. 1163. The Attorney General is authorized to enforce such laws, or assist in the enforcement of such laws, upon evidence of violation as a matter of Federal law, or upon the referral of information by the Commission pursuant to section 16(b) of this Act.

SEC. 17. (a)(1) Not less than three-quarters of the annual budget of the Commission shall be derived from an assessment of not to exceed two and one-half percent of the gross revenues from each Indian gaming activity regulated pursuant to this Act.

(2) The Commission, by a vote of not less than five of its members, shall annually adopt the rate of assessment authorized by this section which shall be uniformly applied to all gaming activities and which shall be payable on a quarterly basis.

(3) Failure to pay the assessment shall, subject to the regulations of the Commission, be grounds for revocation of any approval or license of the Commission required under this Act for the operation of tribal gaming.

(4) To the extent that funds derived from such assessments are not expended or committed at the end of the budget year, such surplus funds shall be credited to each gaming activity on a pro rata basis against the assessment for the succeeding year.

(5) For purposes of this section, gross revenues shall constitute the total wagered monies less any amounts paid out as prizes awarded.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal cycle of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 18, in an amount not to exceed one-third the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to section 16 shall be subject to the approval of the Secretary and shall be included as part of the budget request of the Department of the Interior.

SEC. 18. (a) Subject to the provisions of the section 17, there is hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 17, there is hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for the first fiscal year after the date of enactment of this Act.

SEC. 19. For the purposes of this Act—

(1) "Attorney General" means the Attorney General of the United States;

(2) "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act;

(3) "Indian lands" means—

(i) all lands within the limits of any Indian reservation; and

(ii) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or which is held by any Indian tribe or individual subject to a restriction by the United States against alienation over which an Indian tribe exercises governmental power;

(4) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as possessing powers of self-government;

(5) "gaming" means to deal, operate, carry-on, conduct, or maintain for play any banking or percentage game of chance played for money, property, credit, or any representative value, and shall consist of—

(A) "Class I gaming" which shall include social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations;

(B) "Class II gaming" which shall include the game of chance commonly known as bingo or lotto and which is played for prizes, including monetary prizes, with cards bearing numbers or other designations, the holder covering such numbers or designations as objects, similarly numbered or designated, are drawn or electronically determined from a receptical and the game being won by the person first covering a previously designated arrangement of numbers or designations or such card, and shall also include pull-tabs, punch boards, and other games similar to bingo; and

(C) "Class III gaming" which shall include all other forms of gaming not defined in subparagraph (A) and (B) of this paragraph.

(6) "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses including management fees; and

(7) "Secretary" means the Secretary of the Interior.

SEC.20. Consistent with the requirements of this Act, 18 U.S.C. Sec. 1307 shall apply to any gaming activity conducted by a Tribe pursuant to this Act.

SEC. 21. In the event that any section or provision of this act is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act shall continue in full force and effect.

PURPOSE

The purpose of H.R. 1920, by Mr. Udall and others, is to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations.

BACKGROUND

Although Indian tribes have engaged in the operation of gaming activities on their reservations for some time and although some tribes have conducted bingo operations on a regular basis since at least 1974, it is not until recently that such gaming operations have begun to proliferate at a rapid pace. Recent information indicates that at least 80 such operations are currently in existence.

Tribal involvement in the conduct of gaming activities started to increase after the seminal case of *Seminole v. Butterworth,* 658 F 2d. 310 (1982).

In this case, the 5th Circuit upheld a ruling of the Federal District Court that the Seminole Tribe of Florida could

engage in bingo gambling within the reservation free of State licensing and State regulation. While the court found that the State of Florida has criminal and civil jurisdiction over the Seminole reservation pursuant to Public Law 83-280, it found that, pursuant to the Supreme Court's Decision in *Bryan V. Itasca County,* 426 U.S. 373 (1976), P.L. 83-280 did not confer general regulatory power over Indian tribes.

Therefore, the question of whether or not Florida had the right to license and regulate bingo operations on the Seminole Reservation turned on whether the State law regulating bingo operations was *criminal/prohibitory* in nature or *civil/regulatory.* Finding that the operation of bingo games in Florida was not prohibited by the State law as against public policy, but merely regulated, the Court held that the State law was civil/regulatory in nature and, therefore, was not applicable to bingo operations on the Indian reservation. Similar decisions were handed down in the case of *Oneida Tribe of Indians* v. *Wisconsin,* 518 F. Supp. 712 (1981) and *Barona Group of the Capitan Grande Band of Mission Indians* v. *Duffy,* (9th Circuit; 1982).

Whether a certain activity is against the public policy of the State has also determined whether such gambling activity is legal under the Organized Crime Control Act of 1970. This Act prohibits gambling businesses which are in violation of the laws of the State in which they are located. The Federal courts have concluded that gambling activities which are regulated rather than prohibited by State law are not against the public policy of the State and therefore not violative of the Organized Crime Control Act. See: *U.S.* v. *Farris,* 624 F. 2nd 890 (9th Cir. 1980).

Besides the favorable court decisions, it is clear that in these times of Federal budget reductions many tribes which have traditionally relied on Federal funding to conduct their tribal government operations, have found the reve-

nues generated from tribal gaming operations on the reservations to be a welcome source of funds to replace dwindling Federal funds. As the Department of the Interior stated during its testimony on the bill:

> Indian reservation gambling provides economic benefit to many of the tribes involved, especially those with no valuable natural resources or other significant sources of income. Tribes have used their bingo income for a variety of purposes relating to the welfare of their members including * * * payment of medical expenses for tribal members * * * fire department equipment and operation, road repairs, and flood control repair.

The proliferation of tribal gaming operations was also encouraged by President Reagan's Indian Policy Statement which encouraged the tribes to reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government and which pledged to assist tribal governments by removing impediments to tribal self-government. This policy also encouraged private sector involvement and innovative approaches to overcome the legislative and regulatory impediments to economic progress. To comply with this policy and Federal law, the Department of the Interior has approved tribal ordinances and laws providing for tribal regulations of gaming activities on Indian lands and testified during the Committee hearings that, "We wish to permit continuation of Indian bingo as a matter of Federal policy, but recognize that it had to be regulated effectively to avoid the potential law enforcement problems."

It is precisely such potential law enforcement concerns and especially allegations of criminal infiltration by organized crime which first interested the Committee in the issues facing gaming on Indian lands. On the issue of organized crime, the Committee has not found any conclusive evidence that such infiltration has occurred. The

Justice Department, in its testimony on the bill stated that, while it did not claim that Indian gambling operations were presently "mobbed-up", there was still a potential for such infiltration by organized crime especially after such operations have become successful and have established their credentials and legitimacy.

The conclusion that organized crime has not infiltrated Indian gaming operations is also reflected in the findings of the 9th Circuit Court of Appeals decision in *Cabazon Band of Mission Indians and Morongo Band* v. *Riverside* (February 26, 1986) which stated that, in spite of the State's concerns about intrusion by organized crime in California, "There is no evidence whatsoever that organized crime exists on these reservations."

In this recent 1986 Opinion, the State of California had argued that the recent decision of *Rice* v. *Rehner*, 463 U.S. 713 (1983) demanded a re-examination of the civil/regulatory-criminal/prohibitory distinction because the Supreme court had rejected what it terms a "substantive-regulatory" distinction in interpreting the intent of a Federal statute which exempted from Indian Country the application of certain Federal laws regulating alcohol. The Supreme Court in *Rice* held that such statute did give the States concurrent jurisdiction with the tribes over liquor regulations in Indian country.

The 9th Circuit, however, in its 1986 decision, held that the Supreme Court's decision in *Rice* v. *Rehner* did not change the legal doctrines governing the legality of Indian gambling on Indian lands. Since P.L. 280 only vested the States with full criminal jurisdiction, and not with civil regulatory power in Indian Country, the question to be decided was still whether the State regulations concerning such gambling operations were criminal/prohibitory or civil/regulatory in nature. The Court held that since these gambling operations were not prohibited by the State public

policy, they were only civil/regulatory in nature and therefore not applicable in Indian Country.

The Supreme Court, in *Rice* v. *Rehner*, was not adopting a new doctrine by which to measure the extent of State power in Indian Country and was not espousing a new theory on Indian sovereignty. The Court instead was following a long line of legal precedents in attempting to measure the backdrop of Indian sovereignty in a preemption analysis. In the course of such analysis, the Court stated that, "The role of tribal sovereignty in preemption analysis varies with the particular notions of sovereignty developed from historical traditions of tribal independence." The Court included that, when it comes to liquor regulations, Indian sovereignty was not important because the Federal Government had divested the tribes from the power to regulate liquor on the reservation since colonial times. As a matter of fact, the Court concluded that there was an historical tradition of concurrent Federal and State jurisdiction over the use and distribution of alcohol on the reservation since some of the States were required to enact laws prohibiting the sale of liquor in Indian Country as a condition of entry into the United States.

There are vast historical differences in the manner that the United States has treated alcohol and gaming activities in Indian Country. Except for a prohibition against the operation of mechanical devices such as slot machines, the Federal government has never attempted to prohibit or regulate gambling activity within Indian country. In like manner, there is no specific or general Federal law conferring authority on States to regulate gaming activity within Indian Country.

While there has been a history of tribal gaming activity or gaming regulation for a number of years, it has only been in recent years that tribes have begun to develop gaming as an economic enterprise to generate tribal governmental revenue. These tribal gaming activities have

brought the Indian and non-Indian communities into conflict.

While Indian tribes have vigorously protested proposed actions to limit or infringe upon their rights to generate revenue to support tribal government and tribal programs, they have recognized that there may be a need to enact Federal legislation to protect these revenue-generating activities from over-reaching on the part of outside interests and from the attentions of criminal elements.

States and non-Indian parties interested in, or affected by, Indian gaming activity have felt threatened by these activities and have sought means to prohibit or restrict these activities. In some cases, they have sought to advance solutions which would subject the tribal activities to the laws of the State.

H.R. 1920, as amended, is an attempt to meet the concerns of all parties while preserving the integrity and rights of tribes to be governed by their own laws and protecting the right of tribes to generate necessary revenue to support tribal government and programs.

COMMITTEE AMENDMENT AND SECTION-BY-SECTION ANALYSIS

The Committee considered an amendment in the nature of a substitute for purposes of Committee markup. This Substitute, after further amendment, was adopted by the Committee as an amendment to H.R. 1920. The major provisions of the Substitute and its differences from H.R. 1920, as introduced, are discussed in the Explanation section of this report. A section-by-section analysis of the amended bill and a more detailed explanation of its provisions follows:

Section 1

Section 1 cites the Act as the "Indian Gaming Regulatory Act".

Section 2

Subsection (a) contains various congressional findings relating to the conduct of gaming activities on Indian reservations. Paragraph (1) notes that a number of tribes have engaged in gaming as a means of generating tribal revenues. The record developed by the Committee shows that many tribes, faced with severe cuts in Federal program aid supporting tribal government and tribal programs, and lacking a tax base or other source of governmental revenue, have turned to gaming as a source of such revenue. In this respect, they are not unlike many State governments who have turned to State lotteries or other forms of gaming to supplement their tax revenue.

Paragraph (2) finds that, under existing law, Indian tribes may engage in, or license and regulate, gaming activities on Indian lands where that activity is not prohibited by some specific Federal law and where it is conducted in a State which does not prohibit the gaming activity as a matter of the criminal laws of such State.

Paragraph (3) notes that there is no existing Federal law that requires Federal approval of management contracts relating to tribal gaming activities. Depending upon the provisions of such contract, it might be subject to approval by the Secretary of the Interior either under authority of 25 U.S.C. 81 or, if it involves the lease or encumbrance of Indian lands, under 25 U.S.C. 177 or some relevant provision of chapter 12 of 25 U.S.C. This bill would not affect those requirements, but would be supplemental thereto. Federal court decisions to this effect are *Wisconsin Winnebago* v. *Koberstein*, 762 F.2d 613, and *U.S. ex rel. Shakopee* v. *Pan American*, No. 4-85-880.

Paragraph (4) states that existing Federal law does not provide clear standards or regulations for the orderly conduct of gaming activities on Indian lands.

Paragraph (5) finds that a principal goal of Federal Indian policy is to promote strong tribal government and tribal self-sufficiency and economic development.

Paragraph (6) finds that revenue derived by a tribe from gaming operations is a legitimate source of funds for tribal government and programs.

Subsection (b) finds that the establishment of Federal standards and a National Indian Gaming Commission is necessary to meet the concerns regarding Indian gaming and to protect gaming activities as a source of tribal revenue.

Section 3

Subsection (a) provides that Class II and III gaming regulated by this Act shall be unlawful on any lands acquired by the Secretary in trust for an Indian tribe after December 4, 1985, if such lands are outside the boundaries of such tribe's reservation.

Subsection (b) provides that subsection (a) shall not be applicable if the tribe involved obtains the consent of certain State and local governing bodies.

Section 4

Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.

Section 5

Subsection (a) provides for the establishment of a National Indian Gaming Commission as an independent entity within the Department of the Interior.

Subsection (b), paragraph (1) provides that the Commission shall be composed of eight members with one appionted by the Secretary to serve as chairman, one to be selected by the Attorney General, five to be appointed by the Secretary from a list provided by Indian tribes engaged in gaming activities, and one to be appointed by the Secretary to represent State interests.

Paragraph (2) provides that not more than four of the members may be from the same political party.

Paragraph (3) provides for the terms of office of the Commissioners, except for the Chairman who will serve at the pleasure of the Secretary, and provides for staggered terms for the first panel of members.

Paragraph (4) prohibits any person who has been convicted of a felony or gaming offense, has any management responsibility for a gaming activity regulated under the Act, or has a financial or other interest in a management contract from being appointed to, or continue service on, the Commission.

Paragraph (5) authorizes removal of members of the Commission, except for the Chairman, by a majority vote of the rest of the members for good cause subject to the approval of the Secretary or, in the case of the member selected by the Attorney General, his approval.

Subsection (c) provides for the filling of vacancies on the Commission.

Subsection (d) provides that five members of the Commission shall constitute a quorum.

Subsection (e) provides for the selection of a Vice-Chairman by the Commission.

Subsection (f) provides that the Commission shall meet at the call of the Chairman or a majority of the members of the Commission.

Subsection (g) provides for the payment of the members of the Commission and reimbursement for travel, subsistence and other necessary expenses incurred in the performance of their duties.

Section 6

Subsection (a) gives the Chairman exclusive power to approve tribal ordinances relating to Class II gaming, approve management contracts for Class II and III gaming, and to select, appoint, and supervise Commission staff.

Subsection (b) gives the Chairman power, subject to the approval of the Commission, to appoint a General Counsel, promulgate regulatory schemes for Class III gaming, and to issue order of temporary closures of gaming activities.

Subsection (c) gives the Chairman power, subject to appeal to the Commission, to approve or disapprove Class III ordinances, resolutions or licenses and to levy and collect civil fines as provided by the Commission.

Subsection (d) provides that the Chairman shall have such other powers as may be delegated by the Commission.

Section 7

Subsection (a) provides that the Commission shall have the power, not subject to delegation, to approve the annual budget of the Commission, to adopt regulations for assessment and collection of civil fines, to adopt the annual assessments as provided in section 17 upon an affirmative vote of not less than five members, to authorize the Chairman to issue subpoenas by an affirmative vote of not less than five members, and by an affirmative vote of not less than five members and after a full hearing, to make permanent a temporary order of the Chairman for closure of a regulated gaming activity. It is the intent of the Committee that tribes or operators of tribal gaming activities subject to a permanent order of closure, in addition to any appeal rights, shall have the opportunity to reestablish

their gaming activity after meeting all compliance requirements of the commission.

Subsection (b) sets out numerous general powers of the Commission necessary for the implementation of the Act and its responsibilities.

Section 8

Subsection (a) authorizes the Chairman, with the approval of the Commission, to appoint a General Counsel with a background in Indian affairs and establishes a maximum rate of pay for such position.

Subsection (b) provides that the Chairman may appoint other authorized staff of the Commission without regard to laws governing appointments in the competitive service and without regard to the pay provisions of title 5, U.S.C., except that no one so appointed could be paid in excess of the rate of pay established for a GS-17.

Subsection (c) authorizes the Commission to procure temporary and intermittent services as provided in section 3109(b) of title 5, U.S.C.

Subsection (d) authorizes, at the request of the Chairman, other Federal agencies to detail personnel to the Commission unless otherwise prohibited by law.

Subsection (e) provides that the Secretary or the Administrator of GSA shall provide administrative support services to the Commission on a reimbursable basis.

Section 9

Section 9 authorizes the Commission to request, and heads of Federal agencies or departments to provide, information necessary to enable it to carry out this act, if not otherwise prohibited by law.

Section 10

Section 10 directs the Secretary to appoint the members of the Commission as soon as practicable and to provide interim staff and support assistance to the Commission.

Section 11

Subsection (a), paragraph (1) provides that class I gaming, defined in section 19 as social and traditional Indian gaming, shall remain in the exclusive jurisdiction of Indian tribes and shall not be subject to this Act. As with most cultures, most Indian tribes engaged in traditional gambling activities. The "stick" or "bone" game, with variations, was and is played among many Indian tribes, usually in conjunction with tribal ceremonies or feasts. Wagering on horse races or athletic contests, such as Lacrosse, was a common occurrence. Also, Indians engage in social, noncommercial gaming like poker in common with the rest of the Nation. It is these kind of activities which would not be covered under this legislation.

Paragraph (2)(A) provides that, except as limited in subparagraphs (B) and (C), Indian tribes may engage in, or license and regulate, Class II and III gaming on Indian lands if a tribal ordinance or resolution to that effect is approved pursuant to subsection (b) or (c) of this section. The subparagraph further provides that any licenses requires under the Act would be required for each place, facility, or location. It is the intent of the subparagraph that a tribal ordinance not be approved which provides a general, blanket authorization of a gaming activity.

Subparagraph (B) provides that gaming under subparagraph (A) would not be legal if (1) the gaming activity is specifically prohibited by Federal law or (2) it is prohibited by the State involved as a matter of public policy and criminal law. The only existing specific Federal law prohibiting gaming activity on Indian lands is found in section 1175 of title 15, United States Code, prohibiting

gambling device within Indian country. It is not the Committee's intent that general Federal laws limiting gaming activity be applicable to tribal gaming activity meeting the test of the second criterion of subparagraph (b).

The second limitation contained in subparagraph (b) is a recognition of existing law on gaming on Indian reservations as articulated in the cases of *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981) and *Barona Group of Capitan Grande Band, etc.* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982). The *Barona* case was reconfirmed by the 9th Circuit Court of Appeals in its February 25, 1986, decision in *Cabazon Band of Mission Indians* v. *County of Riverside et al.*, No. 84-6635. These cases, and several lower court cases, have held that where a State permits the operation of, and general public participation in, gaming activities, a tribe within that State may, as a matter of tribal and Federal law, engage in that activity free of State licensing and regulatory laws.

Subparagraph (C) provides that subparagraph (A) shall not apply to gaming on Indian lands within the State of Nevada. The effect of this provision is to leave the State of Nevada and the tribes where existing laws finds them. It is the intent that the provisions of H.R. 1920 not affect, in any way, what the existing law may be.

Subsection (b), paragraph (1) provides that an Indian tribe may engage in, or license and regulate, Class II gaming (defined in section 19 as including bingo and related games) if a tribal ordinance or resolution is approved by the Chairman of the Commission.

Paragraph (2) provides that the Chairman must approve such ordinance if it meets the minimum standards set out in the paragraph. Subparagraph (A) provides that the tribe, except as provided in paragraph (3), must have the sole proprietary interest and responsibility for conduct of the gaming activity. This is not meant to preclude the em-

ployment, by contract or otherwise, of non-tribal persons or entities to manage or operate the tribal enterprise.

Subparagraph (B) provides that net tribal revenues from the gaming activity may only be used to fund tribal government operations or programs; provide for the general welfare of its members; promote tribal economic development; denote to charitable organizations; or to help fund local government agencies. It further states that, if the funds are used to make per capita payments to tribal members, such payments will be subject to Federal taxation. It is not intended that this be the case if any of such revenue is taken in trust by the United States, in which case the provisions of the Act of August 2, 1983 (97 Stat. 365) would be applicable.

Subparagraph (C) requires that outside, independent audits be conducted annually on the gaming activity and be made available to the Commission.

Subparagraph (D) provides that all contracts for supplies, services, or concessions in excess of $25,000, except for legal or accounting services, be subject to such audits if related to the gaming activity. This language is to insure that ancillary services related to a gaming activity are subject to open audits as the Committee is advised that criminal elements often target these activities for infiltration.

Subparagraph (E) provides that the tribal ordinance shall provide that the gaming activity will be conducted in a way which would protect the environment and the public health and safety. It is not intended by this provision that the tribal gaming activity be subject to general Federal laws relating to the environment unless it would be so subject under existing law.

Paragraph (3) provides that a tribal ordinance or resolution may provide for the licensing and regulation of individuals and entities other than the tribe on the

reservation. However, the effect of the ordinance must be that any person or entity eligible for a tribal license would be eligible for a State license if they applied under State law and State jurisdiction. In addition, the ordinance must establish a tribal regulatory scheme for such non-tribal gaming activities which is no less stringent than that established by the State for gaming operations within its jurisdiction.

Paragraph (4) provides that the Chairman shall approve, within 160 days of submission, the tribal ordinance if it meets the minimum requirements of the subsection and, if he has not acted within such time, the ordinance shall be deemed approved.

Subsection (c) provides for the regulation of tribal Class III gaming (defined in section 19 as all forms of gaming other than Class I and II). Paragraph (1) provides that tribes may engage in, or license and regulate, Class III gaming if authorized by a tribal ordinance meeting the requirements of this subsection and approved by the Chairman.

Paragraph (2) provides that the Commission shall adopt comprehensive gaming regulations for Class III gaming which are to be identical to those provided for the same or similar gaming activity by the State in which the gaming is to be conducted. It is not the Committee's intent that all State law relating to gaming activity be incorporated into the Commission's regulatory scheme, only those which deal with the regulation of the conduct of ongoing games.

Paragraph (3) provides that, where there are criminal penalties attached to the civil/regulatory scheme, violations of those penal provisions can be enforced by the State, where the State has the necessary criminal jurisdiction under Public Law 83-280, or by the United States under the Assimilative Crimes Act (18 U.S.C. 13), as if such

criminal penalties were a part of the criminal/prohibitory laws of the State.

As noted by the Supreme Court in the case of *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply". By P.L. 82-280, Congress specifically transferred certain criminal and civil jurisdiction over Indians in Indian country to certain named States and authorized other States, under certain circumstances, to assume such jurisdiction. It is clear that States having been conferred or having assumed jurisdiction under P.L. 280 have full criminal jurisdiction over Indians within Indian country. However, any State civil jurisdiction deriving from P.L. 280 has been narrowly construed by the decision of the Supreme Court in the Case of *Bryan* v. *Itasca County*. 426 U.S. 373 (1976). The Court noted that the primary intent of the civil law provision of P.L. 280 was to grant State jurisdiction over private civil litigation involving Indians in State courts and not the full panoply of State civil/regulatory law. The court stated:

> * * * nothing in (P.L. 280's) legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations," *United States* v. *Mazurie*, 419 U.S. 544 (1975)—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of State and local governments.

In upholding the power of Indian tribes, as a matter of tribal and Federal law, to engage in or license and regulate

gaming on Indian lands, the Federal courts have based their holdings on the Court's decision in the *Bryan* case. *Seminole Tribe* v. *Butterworth; Barona* v. *Duffy; Cabazon* v. *Riverside,* supra. The court's have held that, where a State permits the conduct of, and general public participation in, a gaming activity as a matter of State civil/regulatory law, Indian tribes within such State have a right to engage in, or license and regulate, such gaming activity on Indian lands free of State licensing and regulatory law. This is true even where criminal penalties may be attached to the regulatory laws. As noted in the *Seminole* case:

> Although inclusion of penal sanctions makes it tempting at first to classify the statute as prohibitory, the statute cannot be automatically classified as such. A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. * * * The classification of the statute is more complex, and requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.

The same limiting rationale would be true in non-P.L. 280 States where the United States would attempt to enforce State law within Indian country under the Assimilative Crimes Act or other general Federal statute. Paragraph (2) requires the Commission to adopt and apply to tribal Class III gaming the regulatory aspects of the State laws on gaming. Concerns were expressed to the Committee about the enforceability of any penal sanctions attached to those regulatory provisions. Paragraph (3) would permit the States or the United States, as appropriate, to enforce those criminal sanctions as if they were part of the criminal/prohibitory laws of the State.

Paragraph (4) provides that the Chairman shall approve an ordinance or resolution on Class III gaming and shall issue a license if the ordinance or resolution meets the minimum standards imposed on Class II gaming in subsection (b) and conforms to the regulations adopted by the Commission pursuant to paragraph (2).

Paragraph (5) provides that, prior to approving a Class III license, the Chairman shall make an analysis of the prospects for the proposed gaming activity as a sound economic enterprise. Included in such analysis would be a consideration of the financial foundation of the proposal, the impact of granting the license on tribal and near-by non-Indian communities, and the ability of the licensee to operate in a fair and safe manner. It is not the Committee's intent that this analysis be a cause for denial of a license, but a means of assisting the tribes in developing and implementing a profitable, safe source of tribal revenue.

Section 12

Subsection (a) provides that, subject to the Chairman's approval, an Indian tribe may enter into a management contract for the operation of a Class II or III gaming activity. It requires that, before approving such contract, the Chairman require and obtain detailed background and financial data on persons or entities associated with the management contractor.

Subsection (b) provides that any management contract entered into shall make specific provision that (1) adequate accounting procedures be maintained and verifiable financial reports be prepared by or submitted to the tribal governing body on a monthly basis; (2) appropriate tribal officials be guaranteed reasonable access to the daily operations of the gaming activity and have the right to verify daily income; (3) a minimum guaranteed payment to the tribe has preference over retirement of development and construction costs; (4) an agreed ceiling for the repayment

of such costs; (5) a maximum contract term of five years; and (6) grounds and mechanisms for terminating the contract, such termination not to require the approval of the Chairman.

Subsection (c) permits the Chairman to approve a contract with a fee based upon a percentage of the net revenues, but such percentage fee may not exceed forty percent.

Subsection (d) provides that the Chairman must approve or disapprove the contract on its merits within 120 days or, at the end of such period, the contract will be deemed approved.

Subsection (e) provides that the Chairman shall disapprove a contract where he determines that (1) a person listed in paragraph (a)(1) is an elected member of the tribal governing body, has been or subsequently is convicted of a felony or gaming offense, has knowingly provided materially false information to the Commission or tribes, or is of a general disreputable character; (2) the management contractor has or attempts to interfere or influence tribal government; (3) the management contractor has deliberately or substantially failed to comply with the contract terms or the tribal ordinance; or (4) a trustee exercising normal skill and diligence would not approve such contract.

Subsection (f) permits the Chairman, after notice and hearing, to require appropriate contract modification or to void such contract if he determines that violations of this section have occurred.

Subsection (g) provides that no management contract shall transfer or, in any manner, convey any interest in land or other real property unless specifically provided in the contract. It is not the Committee's intent to authorize or permit the conveyance or encumbrance of trust or restricted Indian property through such contract without

compliance with any existing Federal law regulating such property.

Section 13

Subsection (a) provides that, as soon as possible after organization of the Commission, the Chairman shall notify any tribe or management contractor who, prior to enactment of this legislation, adopted a tribal ordinance or entered into a contract on Class II or III gaming that such ordinance or contract must be submitted for his review within 60 days.

Subsection (b) provides that the Chairman, within 90 days after submission of a Class II ordinance under subsection (a), shall approve it if it conforms to section 11(b). If he determines that it does not, he shall advise the tribe of necessary modification and the tribe will have 120 days to come into compliance by making the necessary modifications.

Subsection (c) provides that the Chairman, within 90 days after adopting a Class III regulatory scheme by the Commission governing the gaming activity involved in a Class III ordinance submitted pursuant to subsection (a), shall review the ordinance to determine if it conforms to such regulatory scheme and meets the requirements of section 11(b). If he does, he shall approve the ordinance and issue the necessary license. If he determines it does not, he shall advise the tribe of necessary modification and the tribe shall have 120 days to come into compliance.

Subsection (d) provides that the Chairman, within 120 days after submission of a management contract pursuant to subsection (a), shall subject such contract to the requirements and process of section 12. If he determines that the contract and the management contractor meet the requirements of section 12, he shall approve the contract. If he determines that they do not, he shall provide notice to the tribe and to the contractor of necessary mod-

ifications and they shall have 120 days to come into compliance. The subsection also provides that, where the Secretary of the Interior or his representative has previously approved a contract submitted pursuant to subsection (a), such contract shall be deemed in compliance with the provisions of the Act and no further action shall be required. While the Committee intends that contracts previously approved by the Secretary shall be deemed in compliance with this Act, it is not intended that this would work to cure any legal insufficiency in such contract or approval under any other applicable tribal or Federal law.

Section 13 is a recognition by the Committee that there are numerous legal Indian gaming operations now being conducted on Indian lands and that those operations should be brought into compliance with the provisions of this law in a deliberate manner. It is not intended that those operations be affected by the provisions of this Act prior to the implementation of section 13.

Section 14

Subsection (a) provides that the Commission shall have authority to authorize the Chairman to levy and collect civil fines, not exceeding $10,000 per violation, against Indian gaming activities or management contractors for violations of the provisions of this Act or regulations adopted pursuant to the Act. It also provides that parties against whom the Chairman levies a fine shall have an opportunity for an appeal and hearing before the Commission.

Subsection (b) provides that the Chairman shall have power to temporarily close a gaming activity covered by this Act for substantial violation of the Act or regulations adopted by the Commission. The Indian tribe or contractor involved shall have a right to a hearing, within 30 days after an order of temporary closure, before the Commission to determine if the order should be made permanent. The Commission may order permanent closure after such

hearing only upon an affirmative vote of not less than five of its members.

Subsection (c) provides that final decisions of the Commission under subsection (a) and (b) shall be appealable to the appropriate Federal district court under the Administrative Procedures Act of title 5, United States Code.

Section 15

Subsection (a), paragraph (1) provides that the Commission may authorize the Chairman to issue subpoenas to compel the attendance of witnesses and the production of evidence that relates to matters which the Commission is empowered to investigate.

Paragraph (2) provides that witnesses and evidence may be required from any place in the United States to any place of hearing.

Paragraph (3) provides that, upon application by the Commission, appropriate Federal courts may enforce subpoenas of the Commission by holding defaulting parties in contempt of court.

Paragraph (4) provides that Commission subpoenas shall be served in the same manner as provided in the Federal Rules of Civil Procedures for Federal district courts.

Paragraph (5) provides that all process of any court to which application is made under this section may be served in the judicial district where the person required to be served resides or is found.

Subsection (b) provides that no person may refuse to comply with a subpoena on the grounds that any testimony given or evidence produced might tend to incriminate him, but no such person shall be subject to prosecution or any penalty or forfeiture by reason of being compelled to testify or produce evidence. However, the person would not be immune from prosecution and punishment for perjury in so testifying.

Section 16

Subsection (a) provides that, except as provided in subsection (b), the Commission shall keep confidential information received pursuant to this Act pursuant to section 552(b)(4) and (7) of title 5, U.S.C.

Subsection (b) provides that information covered by subsection (a) may be provided by the Commission to appropriate law enforcement officials when it indicates a violation of Federal, State or tribal criminal statutes or ordinances.

Subsection (c) provides that the Attorney General is authorized to investigate activities associated with gaming under this Act which might be a violation of Federal laws. The Attorney General is authorized to enforce or assist in the enforcement of such laws upon evidence of a violation as a matter of Federal law or upon referral of information from the Commission under subsection (b). This subsection is meant merely as a reaffirmation of the existing responsibility of the Attorney General to investigate and prosecute crimes within Indian country under existing Federal law.

Section 17

Subsection (a), paragraph (1) provides that not less than three-quarters of the Commission's annual budget shall be derived from assessments of Indian gaming activity of not to exceed two and one-half percent of gross revenues.

Paragraph (2) provides that the Commission, by an affirmative vote of not less than five of its members, shall annually adopt the rate of assessment which shall be uniformly applied to all gaming activities and payable on a quarterly basis.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Paragraph (4) provides that funds assessed in one year and not expended shall be carried over and credited on a pro rate basis against assessments for the succeeding year.

Paragraph (5) defines gross revenue, for purposes of this section, as total wagered monies less amounts paid out as prizes.

Subsection (b), paragraph (a) provides that the Commission, in coordination with the Secretary of the Interior and in conjunction with the Federal fiscal cycle, shall annually adopt the budget for the Commission.

Paragraph (2) provides that the Commission may request Federal appropriations, as provided in section 18, which not exceed more than one-third of the total assessment authorized and collected in the preceeding fiscal year.

Paragraph (3) provides that the Commission's appropriation request shall be subject to the Secretary's approval and included in the budget request of the Department of the Interior.

Section 18

Subsection (a) provides that, subject to section 17, there is authorized to be appropriated for the expenses of the Commission such sums as may be necessary.

Subsection (b) provides that, notwithstanding section 17, there is authorized to be appropriated not to exceed $2,000,000 to fund the Commission in the first fiscal year after enactment.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Section 19

Section 19 contains definitions of various terms used in the Act.

Section 20

Section 20 provides that, consistent with the provisions of the Act, section 1307 of title 18, United States Code, shall apply to tribal gaming activities. It is intended that gaming activities of an Indian tribe, whether operated directly by the tribe or under any managment contract, would be treated the same as a State-owned gaming activity.

Section 21

Section 21 contains a severance clause providing that the invalidation of any provision of the Act shall not operate to invalidate the remaining provisions.

EXPLANATION

As introduced, H.R. 1920 established minimum Federal standards for the conduct of gaming activities on Indian lands. The bill provided that a tribunal ordinance or resolution, meeting those minimum standards, was subject to the approval of the Secretary of the Interior. In addition, the bill required that management contracts entered into by Indian tribes for the operation of tribal gaming activities would be subject to Secretarial approval under stringent criteria governing elements of such contract and the contracting entity.

Indian tribes initially opposed the legislation as an unwarranted intrusion upon tribal governmental sovereignty and an impairment of legal rights confirmed through extensive litigation in the Federal courts. Tribal support did develop on the legislation, primarily because of Indian concern about growing over-reaching by outside management contractors and because of concerns being expressed about the possibility of infiltration of the games by elements or organized crime.

On the other side, opposition to the bill was advanced by some State governmental representatives and certain

private interest groups because of their concern about the impact of Indian gaming activity not being subject to the regulatory and enforcement laws of the States. This opposition was grounded in the belief that gaming activities of Indian tribal governments operated for the purpose of generating tribal governmental revenue.

After full Committee hearings on the legislation and the receipt of extensive correspondence from concerned parties, the Committee concluded that many of the concerns expressed on both sides of the issue had merit and warranted consideration in the amendatory process. At the direction of the Chairman, an amendment in the nature of a substitute was developed for Committee mark-up purposes. The Substitute sought to strike a middle ground between the opposing viewpoints. This Substitute, after further amendments, was ordered reported favorably by the Committee.

The Substitute made basic changes in the bill as introduced. The Substitute provides for the establishment of a National Indian Gaming Commission as an independent entity within the Department of the Interior and this commission is vested with the implementation of the Act instead of the Secretary of the Interior. Funding for the Commission will come primarily from assessments of tribal gaming activities.

The Substitute divides gaming activities into three classes: Class I including traditional Indian gaming and social gaming; Class I including bingo and related gaming; and Class III including all other forms of gaming.

Each class is treated differently in the Substitute. Class I is left to the exclusive jurisdiction of the tribes. Class II is generally left to the regulatory authority of the tribes, but with the requirement that a tribunal ordinance or resolution be approved by the Chairman of the Commission if it meets the minimum standards set out in the bill. In order to meet the concerns of the States and other non-

Indian parties, Class III gaming, while required to meet the same minimum standards of Class III, would also be subject to detailed regulation by the Commission which is required to adopt a regulatory scheme identical to that of the State in which such activity is conducted.

Finally, the substitute retains the requirements that management contracts be reviewed and approved, but the approval is vested in the Chairman of the Commission. The approval criteria for such contracts have been refined and tightened.

A more detailed explanation of the bill's provisions, as amended is contained in the section-by-section analysis of this report.

LEGISLATIVE HISTORY AND OVERSIGHT STATEMENT

H.R. 1920, introduced on April 2, 1985, by Representative Udall for himself and Representatives McCain, Richardson, Bates, Snowe, Seiberling, and McKernan, is similar to H.R. 4566 introduced by Mr. Udall in the 98th Congress. The Committee held hearings in the 98th Congress on H.R. 4566 on June 19, 1984.

In the 99th Congress, the Committee held three days of hearings on H.R. 1920 and related bills, H.R. 2420, H.R. 3130, H.R. 3745, and H.R. 3752. Hearings were held in Washington, D.C., on June 25, 1985; in San Diego, California, on September 13, 1985; and in Washington, D.C., on November 14, 1985. During these hearings, the Committee took oral testimony from the Departments of the Interior and Justice and from forty Indian and non-Indian public witnesses. In addition, the Committee received numerous statements submitted for the record and extensive correspondence on the subject of the legislation.

The Committee marked up H.R. 1920 on December 4 and 11, 1985. After extensive debate and amendments,

the Committee ordered the bill reported on December 11, 1985, with an amendment in the nature of a substitute.

Similar legislation, S. 902, is pending before the Senate Select Committee on Indian Affairs.

COMMITTEE RECOMMENDATIONS

The Committee on Interior and Insular Affairs, by voice vote on December 11, 1985, ordered H.R. 1920 favorably reported to the House with an amendment.

COST AND BUDGET ACT COMPLIANCE

The enactment of H.R. 1920 could result in a cost to the United States of up to $2,000,000 in the first fiscal year after enactment. Thereafter, the cost to the United States would be an indeterminate amount based upon a cost-sharing formula in the bill with Indian tribes with the tribes bearing 75% of the cost. The analysis of the Congressional Budget Office follows:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 1920.

2. Bill title: Indian Gaming Regulatory Act.

3. Bill status: As amended and ordered reported by the House Committee on Interior and Insular Affairs on December 11, 1985.

4. Bill purpose: This bill establishes the National Indian Gaming commission and the criteria by which it is to regulate Indian gaming. It also delineates the composition, compensation, and duties of the commission.

5. Estimated cost to the Federal Government"

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990	1991
Estimated authorization level	0.5	0.5	0.5	0.5	0.5	
estimated outlays	.5	.5	.5	.5	.5	

The costs of this bill fall within budget function 450.

Basis of estimate: The bill specifies that the commission shall receive at least 75 percent of its funding through assessments on gross gaming revenues, with the remaining funding to be appropriated. Gross gaming revenues are defined as the difference between total revenues and payouts. The assessment is limited to no more than 2.5 percent of gross revenues. The Bureau of Indian Affairs currently estimates annual gross revenues to be about $60 million. This implies annual assessments of up to $1.5 million and a maximum annual commission budget of $2 million, up to $0.5 million of which may be appropriated.

The estimate of the costs of H.R. 1920 is based upon these figures, which assume that gross revenues remain constant over time. Any change in gross revenues would be reflected in the annual funding of the commission, which would increase or decrease accordingly, with the limitation that, in the first fiscal year following the enactment of this bill, total appropriations shall not exceed $2 million. CBO estimates that gross revenues would have to increase tenfold in order for the commission to reach the $10 million to $15 million annual funding for gaming commissions in Nevada and New Jersey.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Paul M. DiNardo.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 1920 would have only a minimal inflationary impact.

DEPARTMENTAL REPORT

Reports were requested from the Department of the Interior and the Department of Justice on H.R. 1920 on October 15, 1985. To date, no report has been received by the Committee from either Department.

SUPPLEMENTAL VIEWS OF MR. UDALL

I feel compelled to respond to the dissenting views filed on this legislation. I feel compelled to do so as Chairman of the Committee which has jurisdiction over most Indian matters and as a member of Congress who has long fought and worked to better the condition of our Indian citizens and to protect their rights against an overwhelming majority.

The Constitution of the United States establishes the relations of this Nation with the Indian tribes. Under the Constitution, Congress has plenary power over Indian affairs and this responsibility has been vested by the House with this Committee.

In carrying out its plenary power over Indian affairs, the second act of the 1st Congress was to reenact the Northwest Ordinance of 1787 which provided in Article 3:

> * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

High sounding words, indeed! A cursory review of our treatment of Indian tribes will reveal most readily that the promise and commitment has been observed more in the breach than in the fulfillment. The "utmost good faith" has not been observed.

The Northwest Ordinance statute has not been repealed and it remains the law of this Land. I will do my utmost

to honor the commitment and promise that it makes to the Indian tribes and our Indian citizens.

It may seem strange that I would raise a point of National honor and commitment in the context of legislation dealing with gambling. Gambling has always had overtones of immorality. I, personally, do not view gaming activities as an appropriate method of generating governmental revenues. That is not the issue here, however. Gambling, in one form or another, is now legal in almost all of the States. More and more States are turning, directly, to gambling as a revenue source to supplement tax revenue. That is understandable in an era of high Federal budget deficits and Gramm-Rudman.

It is even more understandable that Indian tribes would turn to that source of revenue. They have little, if any, tax base. They are almost solely reliant upon Federal funds and programs to provide even the most basic needs. Reservation Indians receive little support from State governments. As noted in the Supreme Court decision of *U.S.* v. *Kagama*, the Indians, "* * * owe no allegiance to the States, and receive from them no protection * * *"

No segment of our population has been more devastated by reductions in Federal programs. Gramm-Rudman, for the tribes, is not a matter of cutting the fat or even losing a little flesh. For them, it is literally a matter of life and death. It is little wonder that they have so desperately turned to gaming for revenue. It is hard to understand those who would deny them this small source of hope.

The Federal courts, interpreting existing Federal-Indian law, have held that Indian tribes may engage in gaming activities free of State law where the States permits gaming as a matter of its civil laws. The dissent suggests that this is unfair and notes the intent to offer an amendment to subject tribal government to State jurisdiction, an infringement upon existing Indian rights. They assert that

this is necessary because, "We need a level playing field * * *"

I, too, have been seeking a level playing field—a level playing field for the Indian tribes and their members:

> a level playing field in economic conditions, when nearly 40% of Indian families are below the income poverty line.
>
> a level playing field in housing, when nearly 50% of Indian housing is substandard.
>
> a level playing field in employment opportunities, when 50% of Indians 16 years and older are unemployed.
>
> a level playing field in health, when the per capita expenditure for Indians in 1985 was $660 compared with $1,200 for the rest of the Nation.

The truth is that, in every circumstance, Indian tribes and people have been playing in the bottom of a pit in the most affluent nation in the world.

I can have little sympathy for the plea of the dissent that their States and their affluent non-Indian constituents be given a level playing field in gaming activities when these kinds of conditions exist among our Indian citizens. The Indians, desperate for some source of revenue in the face of our budget-cutting mania, have found a small source of relief in gaming. Even this is to be taken from them.

In an attempt to protect the rights of Indian tribes, as is my duty under the Northwest Ordinance and, yet, to deal with the many legitimate concerns of States and non-Indian parties, I bring to the floor of the House a compromise bill. The compromises that I have made to deal with the concerns of the dissenters and others are not willing supported by the Indian tribes. Many tribes feel that these compromises of their rights unduly and unnecessarily intrude upon their right of self-government. Most,

very reluctantly, accept the compromises in order to achieve the protections of the legislation and *only* in the context of the Federal-Indian relationship.

In good faith to the Indians, I can offer no more compromise nor accept any further abrogation of the rights they have bargained for in hundreds of treaties ceding lands to this Nation. If an amendment is adopted to subject Indian tribes and their governments to State jurisdiction, I can no longer support this legislation and would feel compelled to oppose its enactment.

From my perspective as Chairman of the Committee to whom the House has entrusted its Constitutional responsibility for Indian tribes, the difference that I have with the dissent transcends the rather narrow and secondary issue of Indian gambling. It goes to the whole nature of our obligations and commitments to the Indian tribes and, ultimately, to the foundation of our form of government in which the rights of the minority are to be protected from the convenience of the majority. Felix S. Cohen, the author of the Handbook of Federal Indian Law and an early civil libertarian stated:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. * * *

In a "Dear Colleague" letter to members of my Committee before Committee markup, I cited another part of the Supreme Court decision in *U.S.* v. *Kagama:* "Because of local ill-feeling, the people of the States where (Indians) are found are often their deadliest enemies." Conferring State jurisdiction over tribal governments and their gaming activities would not insure a "level playing field", but would guarantee that Indian tribes could not gamble at all.

I urge the members of my Committee and the members of the House to reject the position and amendment proposed by the dissent.

MORRIS K. UDALL.

DISSENTING VIEWS

We have serious concerns about the method proposed by the Committee for regulating Class III gambling on Indian lands. It makes little sense to have the National Indian Gaming Commission regulate Class III gaming activity when the states already have in place the appropriate rules and enforcement mechanisms for doing so. We do not believe that the National Commission will have the appropriate funding or manpower to adopt and enforce regulations for all forms of Class III gambling that would take place on Indian lands.

Even though the Commission would be required to adopt identical state regulations, the committee makes it clear that it does not intend "that all state laws relating to gaming activity be incorporated into the Commission's regulatory scheme * * *" Thus, gambling on Indian lands would not be subject to the same rules as gambling on non-Indian lands. There is no justification for treating gaming activity on Indian lands more favorably than the same activity taking place off Indian land. We need a level playing field, and providing two sets of rules for gambling within a state is clearly unfair.

The problems faced by the Commission in adopting and enforcing identical state regulations would be enormous. Potentially, the Commission would have under its responsibility 50 different sets of regulations for each type of gaming activity. The task of monitoring each set of rules, for each type of gambling, in each state, is tremendous. It is extremely doubtful that any commission would be able to adequately enforce these regulations.

While the Committee has agreed to permit the states to have some jurisdiction over gambling on Indian lands in the few states covered by P.L. 280, this jurisdiction is extremely limited. As the report notes, while the states have full criminal jurisdiction over Indians within Indian

country under P.L. 280, any state civil jurisdiction in these states has been narrowly construed by the courts.

At a time when we are continuing to face large budget deficits and we are seeing a number of worthwhile federal programs cuts to the bone, it is incredible that we would consider vesting this National Indian Gaming Commission with such a large task as regulating all Class III gambling on Indian lands. We do not have the money available to fully fund the activities the Commission would be required to undertake in this legislation. We also would be duplicating work that is currently being done by the states in this same area.

The states are well-versed in all the methods that can be used to evade regulations and corrupt gambling. They know how animals can be drugged, games rigged, machinery tampered with, and crimes committed. They have the staff, regulatory apparatus, and expertise to prevent such abuses from creeping into Indian gambling. They also have experience in regulating on Indian lands as the states and tribes have had concurrent jurisdiction over alcohol sales on Indian lands since 1953.

To insure that the states will be able to continue their role in regulating gambling activities, an amendment will be offered on the House floor to place Class III gambling on Indian lands under state jurisdiction. By doing this, we will guarantee that the states have the responsibility for regulating all gambling within their borders, whether it takes place on Indian land, or off Indian land.

TONY COELHO.
JIM MOODY.
BEVERLY B. BYRON.
RICHARD H. LEHMAN.
MANUEL LUJAN, JR.

DISSENTING VIEWS

H.R. 1920 is unacceptable for three major reasons.

First, the primary reason for conducting gambling on Indian reservations is to generate revenue from non-Indians. The governing of certain types of social activities or businesses has been usually left entirely to the states. The management or the rules under which they operate for the sale of liquor, operation of bars and taverns, or even in rare cases, legalized prostitution has been traditionally left to the states and in our opinion that is where it should remain. The Federal Government should not be in the business of establishing and operating a National Indian Gambling Commission. The powers to control Class III Gambling should remain with the States.

The second reason for opposing this bill is of major importance. Who will monitor gambling operations such as horse racing, dog racing, poker tables, slot machines, Jai-Lai games, etc.? These games must be operated in a fair manner and on a continuous basis. Also, if animals are involved, assurances must be made to insure that all safety and health rules and regulations are fully enforced. In our opinion, the Bureau of Indian Affairs, Department of the Interior does not not have the personnel, the training, or the funding to insure the careful monitoring and control of Indian gaming operations. The type of control requires highly trained investigative personnel and a sophisticated law enforcement organization to back them up. Organized crime has repeatedly sought areas where large amounts of cash are involved. To insure basic protections against any intrusion of organized crim requires much more than the BIA has or could provide in the near future.

The third and final major problem associated with Indian gambling is the cost and operation of a National Indian Gambling Commission. How many trained agents, how many law enforcement personnel will be needed to oversee

Indian gambling in potentially over half the States in America? That will be no small chore. Presently, the Bureau of Indian Affairs and Tribal law enforcement on reservations is almost without exception woefully inadequate. Crime on the reservation has been a problem of staggering proportions without the addition of gambling to monitor. Without an adequate Indian law enforcement organization in place, the charge should be left to the States which, in most cases where gambling is permitted, have trained and effective law enforcement personnel.

Without allowing the States to have an active voice and role in gambling within their borders makes H.R. 1920 as it stands unacceptable. We understand that gambling can take place under current court decisions as they now stand. One should not react with a law that confirms these decisions in a way that is not good or acceptable to the vast majority of individuals who may wish to take part in Indian gambling activities.

RON MARLENEE.
LARRY E. CRAIG.
JAMES V. HANSEN.
DICK CHENEY.

APPELLEES' APPENDIX 2

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240
April 7, 1986

Dear Tribal Chairman:

I am writing to inform you that I have issued revised Guidelines for Review of Tribal Bingo Management Contracts and to urge you to submit your management contract for review if you presently have an unapproved contract. A copy of the revised Guidelines is enclosed.

Although the original Guidelines of July 20, 1984, provided that review would be at the option of the tribes, it is now the Department's policy to exercise its authority to review tribal bingo management contracts under 25 U.S.C. § 81 in all cases. As discussed in the revised Guidelines, the new policy was announced in the Secretary's letter of August 6, 1985, to the Governor of the Pueblo of Santa Ana.

If your tribe is conducting bingo under an unapproved bingo management contract, you are at risk that someone may file suit to have your contract declared null and void. 25 U.S.C. § 81 authorizes *anyone* to file suit in the name of the United States and, if successful, to recover half of any money paid to any person by or on behalf of the tribe. Although this old statutory provision has not been much used, a 1983 case demonstrates its potential for disrupting a tribal enterprise. In that case, an outdoor advertising company with an unapproved tribal contract was sued by the president of a rival company. Even though the district court considered the suit to be in reality an unfair competition dispute between the two companies, it held that

§ 81 was broad enough to render the tribal contract null and void. (The contract was approved while the case was pending on appeal so the issue became moot before the appeal was decided. *United States ex rel. Buxbom v. Naegele Outdoor Advertising Co.*, 739 F.2d 473 (9th Cir. 1984).) This case and the cases mentioned above show that § 81 is being invoked increasingly and that it can be used to the detriment of the contracting tribe.

For your own protection, therefore, you should submit your contract for review if you have not yet done so. Prior to submitting the contract, please review the revised Guidelines with your management company and attempt to bring your contract into conformity with the Guidelines.

Sincerely,

/s/ Ross Swimmer
Assistant Secretary—
Indian Affairs

Enclosure

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

To: All Area Directors

From: Assistant Secretary—Indian Affairs

Subject: Review of Tribal Bingo Management Contracts

This memorandum replaces the memorandum of the Deputy Assistant Secretary—Indian Affairs (Operations) issued on July 20, 1984, and amended on April 9, 1985.

On August 6, 1985, the Secretary wrote to the Governor of the Pueblo of Santa Ana about the Pueblo's proposed pari-mutuel dog racing enterprise. In that letter, the Secretary stated that, "[U]nless and until the Congress identifies a more appropriate entity than this Department to review Indian gambling management contracts, it will be the policy of this Department to seek to exercise its authority under 25 U.S.C. § 81 (or under any other appropriate statute) to engage in such review, provided the contract at issue is within the scope of the statute." For purposes of these guidelines, all gambling management contracts of tribes or tribal enterprises should be presumed to fall within the scope of 25 U.S.C. § 81 (or 25 U.S.C. § 415, if a lease is involved).

The Secretary's policy statement recognizes both the fact that bingo management contracts present the potential for imposition upon the tribes and the fact the federal courts are continuing to hold that 25 U.S.C. § 81 makes tribal bingo management contracts null and void unless they are approved. The decision of the U.S. Court of Appeals for the Seventh Circuit in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985),

which held that an unapproved contract was void, was discussed in the Secretary's letter. A more recent decision which reached the same conclusion is *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985).

I will be writing to the tribes to request that they submit their management contracts for review if they have not yet done so. You should also encourage the tribes in your Area which have unapproved contracts to submit them for review. If feasible, you should offer to assist them in renegotiating the contracts to bring them into conformity with the guidelines.

It is my intention that these guidelines will be applied in reviewing all contracts submitted after August 6, 1985, but not yet approved, regardless of the date of the contract.

Management contracts for bingo will continue to be reviewed at the Area level pursuant to the guidelines below.

Until further notice, the following guidelines should be observed in reviewing tribal bingo management contracts.

1. Authority to approve or disapprove tribal contracts may not be delegated to the Superintendents. 10 BIAM 3.5A. Accordingly, tribal bingo management contracts may be acted on only at the Area level or above. However, the Superintendents should participate in the review process and offer their recommendations to the Area Directors.

2. The contract or an accompanying resolution must set forth the scope of authority of the tribal officials who have signed the contract on behalf of the tribe* and identify the provision of the tribal organic document which authorizes the contract.

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* All provisions followed by asterisks are statutory requirements contained in 25 U.S.C. § 81.

3. The contract must set forth (1) the time and place where it was made, (2) the purpose for which it was made, and (3) the thing or things to be done under it.*

4. The contract must have a fixed limited time to run, which must be distinctly stated.* The contract term should not exceed five years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. For contracts of longer than five years duration, the opportunity for renegotiation or other provision for adjustment should arise no later than five years after the contract is entered and thereafter at intervals of no longer than five years.

5. The contract must include the amount or rate per centum of the contractor's fee.* It should also specify the method of computing the fee.

6. The contract must specifically set forth any contingent matter or condition which constitutes a part of the contract.* The contract should state that it represents the entire agreement of the parties.

7. The contract should state that no payments have been made and provide that no payments will be made to any elected member of the tribal government or relative[1] of any elected member of the tribal government for the purpose of obtaining or maintaining the contract or any other privilege for the contractor.

8. The contract must include or have attached a list of all parties in interest to the contract* including, on behalf of the contractor, all investors, including general and limited

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[1] For purposes of these guidelines, "relative" means an individual who is related to an elected member of the tribal government as a father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

partners, all corporate officers and directors, all stockholders of a corporation, and all employees who will have day-to-day management responsibility for the gambling operation. The list must include the residence* and business addresses, occupations*, dates of birth and social security numbers of all such persons. If the contractor is a corporation, its articles of incorporation and the corporate resolution authorizing the contract should also be attached. Additional information, such as resumes of individuals or information on lenders, may be requested if you believe it will assist you in evaluating he contract.

9. The contract should state that no party in interest, as defined in paragraph 8, is an elected member of the tribal government or a relative of an elected member of the tribal government. The contract should provide that the contractor will require any party in interest who is elected to the tribal government or whose relative is elected to the tribal government to divest himself or herself of his or her interest in the contract.

10. The contract should specifically state whether assignments or subcontracts[2] will be permitted. If they are permitted, the contract should provide that no assignment or subcontract is valid until approved by the Secretary or his authorized representative in the BIA. Assignments or subcontracts submitted for approval should include or have attached a list of all parties in interest as defined in paragraph 8 above, including addresses, occupations, dates of birth and social security numbers.

12. Before any contract is approved, the names of persons submitted pursuant to paragraphs 8 and 11 should be transmitted to the FBI for name and record checks. All

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[2] "Subcontract" means any contractual arrangement between the contractor and a third party wherein the third party will have any responsibility for the gambling operation or access to the proceeds of the operation.

such names and results of the FBI checks should be sent to the Chief, Division of Law Enforcement Services, who will maintain a control file of this information. No contract, assignment, or subcontract should be approved where the FBI report shows a felony conviction or plea of nolo contendere for any such person. If the FBI report shows an indictment for any such person, the tribe should be so advised.

13. The contract should require the contractor to furnish the tribe, on at least a monthly basis, statements showing revenues and expenses of the gambling operation and should provide that an independent audit by a certified public accountant acceptable to the tribe will be performed at least annually.

14. The contract should provide that the tribe will receive its portion of the proceeds of the gambling operation on at least a monthly basis. The contract should specify the tribal official or bank account to whom the tribe's portion of the proceeds should be paid and such provision should be consistent with the tribe's constitution and bylaws.

15. The contract should set out the accounting procedures to be used and should provide that the contractor's books of account will be maintained, and its financial statements prepared, in accordance with generally accepted accounting principles.

16. The contract should provide that the tribe has the right to inspect the contractor's books at all reasonable times, such as during normal business hours, and should explicitly recognize the right of the tribe at any time to secure an independent audit of the contractor's accounts.

17. The contract should specifically identify those expenses which constitute operating expenses and provide a method, requiring concurrence by the tribe, for determining the allowability of non-enumerated expenses as operating expenses.

18. The contract should require the establishment of a cash management system adequate to safeguard the funds of the operation and should provide that the tribe will have the right to oversee the system.

19. The contract should have a provision for dispute resolution short of litigation, preferably through a private procedure, such as arbitration.

20. The contract should clearly set out the grounds and procedures for termination of the contract. Breach of contract should be a ground for termination.

21. The tribe should have a valid ordinance authorizing and regulating the gambling activity to be conducted pursuant to the contract, and the contract should state that the gambling operation will be conducted in accordance with the tribal ordinance.

22. The contract should identify the party responsible for employment and personnel matters. A provision for Indian preference is desirable.

23. The contract should be consistent with any related lease of trust land. If no related lease is submitted, the management contract should be examined to determine whether the relationship between the parties, as described in the contract, will require a lease. If it will, the tribe should be so advised.

24. The contract should provide that the contractor will not interfere with or attempt to influence internal affairs or governmental decisions of the tribe.

25. If existing provisions for law enforcement and fire protection are not adequate for the proposed enterprise, the contract should specify how these services will be provided.

26. Compliance with the National Environmental Policy Act is required before a bingo management contract (or related lease) is approved.

27. The contract should be reviewed for legal sufficiency by the Regional or Field Solicitor's Office. This is no substitute for review by Bureau officials under these guidelines, however.

28. If your opinion, after review of a contract, is that the contract may not be in the best economic interest of the tribe, you should advise the tribe of your opinion and the reasons for it. However, if the tribe still wishes to proceed with the contract, and it appears that the tribe has entered into it at arms length and after careful consideration, the tribe's business judgment should be respected, and the contract should not be disapproved solely on the grounds that the tribe may have been able to make a better bargain. On the other hand, where it appears from the contract itself or from surrounding circumstances that the tribe has made a particularly unwise business decision or has been subjected to outside pressure, the contract should not be approved. To assist you in this assessment, you may wish to ask the tribe to submit a narrative describing how the contractor was selected and how the contract negotiations were conducted.

29. If contract modifications sufficient to bring the contract into conformity with these instructions cannot be accomplished, the contract should be disapproved. If the contract is disapproved, the tribe should be informed in writing of the reasons for disapproval.

30. Generally, the Superintendent should, within seven (7) working days of a tribal request to review a gambling management contract, transmit the documents submitted for review and approval to the Area Director. The Area Director should, within three (3) working days, send an acknowledgment of receipt of the documents to the tribe and the contractor. A final decision concerning the contract should be made as soon as possible, and not later than thirty (30) working days after the contract docu-

ments, the FBI reports, and Solicitor's advice are received and after it is clear that no further modifications of the contract will be made. A file should be maintained on the contract which is adequate to show the reasons for approval or disapproval of the contract.

31. Appeals from an Area Director's decision may be made pursuant to 25 CFR Part 2.

Ross Swimmer

No. 85-1708

Supreme Court
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

This brief responds to the Tribes' motion to dismiss the appeal or affirm the lower judgment.

I

AN APPEAL IS PROPER UNDER 28 U.S.C. § 1254(2)

The Tribes argue that this appeal is not proper under 28 U.S.C. § 1254(2) because the Ninth Circuit did not invalidate State laws here. Tribe Br. 6-7. In fact, California gambling laws are meant to apply on Indian reservations as elsewhere, and the Ninth Circuit invalidated California laws as applied on Indian reservations. Indeed, the Tribes' action seeks a declaratory judgment overturning State and local gambling laws as applied on Indian reservations. The Tribes argue that "California laws were left untouched" in that the Ninth Circuit did not strike down California's gambling laws in all cases. Tribe Br. 6. An appeal is clearly proper, however, where a state statute is struck down only "as applied." *Dutton v. Evans*, 411 U.S. 74 (1970). Although the Tribes assert that the Ninth Circuit "did not mention any specific California statute," Tribe Br. 6, the Ninth Circuit fully described California's gambling laws, JS App. 2; made repeated references to California's "bingo statute," "bingo law," and "gambling laws," *id.* at 2, 3, 5, 7, 8; and concluded that California could not apply its "gambling laws" on Indian reservations and enjoined California from so applying its "gambling laws." *Id.* at 11. Thus, the Ninth Circuit clearly held that California's gambling laws are invalid as applied in this case.[1]

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[1] Further, appeals are proper under 28 U.S.C. § 1257 when taken from state court decisions *upholding* state laws as applied on Indian reservations. See, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *cf. Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). In light of the "history of . . . close relationship between" sections 1254(2) and 1257, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 n. 9 (1984), an appeal should be equally proper when taken from federal appellate decisions *invalidating* state laws as applied on Indian reservations. The

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH STATE COURT DECISIONS

A. The Rice and Colville Decisions

In *Rice v. Rehner*, 463 U.S. 713 (1983), this Court held that Indian tribes do not have a sovereign right to sell products to non-Indians in violation of state law, and that the state has the right to regulate such sales under the balancing test. JS 6-7. The Tribes argue that *Rice* is distinguishable because *Rice* primarily interprets and applies a federal statute—18 U.S.C. § 1161—not relevant here. Tribe Br. 15. The Tribes also argue that *Rice* is distinguishable from *Bryan v. Itasca County*, 426 U.S. 373 (1976), because different statutes were involved in the two cases. Tribe Br. 14-15.

In *Rice*, however, this Court primarily applied the balancing test—which is a form of federal common law—and concluded that state interests outweigh tribal interests because of the absence of a sovereign tribal "tradition." 463 U.S. at 720-735. After applying the federal common law, the Court then ruled that the federal statute, 18 U.S.C. § 1161, did not preempt state laws and indeed supported their application. *Id.* at 725-735. Thus, the analytical mode was that the common law balancing test supported the application of state law, and that the federal statute did not change the result and indeed supported it. *Rice*, insofar as it applied the balancing test, is thus not distinguishable here. After

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question whether the statute is "valid," which is the focal inquiry in both sections, is the same in both cases.

Contrary to the Tribes' argument, this Court's decision in *Silkwood v. Kerr-McGee, supra*, does not hold to the contrary. Tribe Br. 6. In *Silkwood*, the federal appellate court invalidated a *discretionary* act by a lower federal court in granting a punitive damages award under authority of a state statute, rather than invalidating the statute itself. Here, the Ninth Circuit directly invalidated California's bingo statutes as applied, and did not invalidate an intervening administrative or bureaucratic action. Indeed, unlike *Silkwood*, this case involves an action for declaratory relief directly challenging the statute itself.

Rice. *Bryan* creates the anomaly that a federal statute intended to broaden state jurisdiction over Indian reservations—Public Law 280—actually confers less jurisdiction than states already have under the common law as interpreted and applied in *Rice*. JS 14.

In *Washington v. Confederated Tribes of the Colville Reservation (Colville)*, 447 U.S. 134 (1980), this Court held that Indian tribes cannot "market an exemption" from state laws to non-Indians. JS 6-7. The Tribes argue that *Colville* is distinguishable because the Tribes here, unlike those in *Colville*, are providing "value" to non-Indians. Tribe Br. 24. In *Colville*, however, as in *Rice*, this Court emphasized that Indian tribes do not have a "vested right" to market products to non-Indians, *Colville*, 447 U.S. at 155, 157; *Rice*, 463 U.S. at 721 n. 7, and did not suggest that the result depends on whether "value" is provided. Indeed, the State interest is stronger here than in *Colville*, because California here absolutely prohibits the particular activity. The Tribes, in "marketing an exemption" from state laws, are allowing non-Indians to engage in conduct forbidden under State law. If Indian tribes can market such exemptions, there is little reason for the State to maintain its bingo prohibitions even in off-reservation areas, and thus the tribal games render California's bingo policy largely pointless.

B. The Penobscot and Seneca-Cayuga Decisions

The Ninth Circuit decision conflicts with the State court decisions in *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983), and *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), both of which, applying the common law balancing test, hold that states have the right to prohibit tribal bingo games that cater primarily to non-Indians. JS 11-12. The Tribes argue that the Ninth Circuit decision does not conflict with a decision "of the highest court of the state in which the case arose," because the California Supreme Court has never addressed the issue here. Tribe Br. 12. Under Rule 17(a) of the Supreme Court Rules, however, review is appropriate when a federal appellate court decides an issue "in a way in conflict with a state court of last resort," whether or not "the case arose" in that particular state. Therefore, the conflict

here is within the purview of Rule 17(a) whether or not the California Supreme Court has addressed the issue.

The Tribes also argue that the Ninth Circuit decision is consistent with an "unbroken line of federal authority" that has addressed the issue. Tribe Br. 11. The federal decisions cited by the Tribes, however, considered only whether a federal statute—Public Law 280—authorizes state gambling laws to be applied on Indian reservations, and did not consider whether such application is authorized under the common law balancing test applied in *Rice*. The Ninth Circuit decision here is the *only* federal appellate decision applying the balancing test in this context, and its decision squarely conflicts with the State court decisions in *Penobscot* and *Seneca-Cayuga*.[2]

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[2] The Tribes also argue that the Ninth Circuit decision does not conflict with *Penobscot* and *Seneca-Cayuga*. Tribe Br. 12-13. *Penobscot* is distinguishable, they argue, because the Maine Court primarily interpreted and applied a federal statute, the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735. Tribe Br. 13. As explained in our Jurisdictional Statement, this holding was a second, alternative holding. JS 11 n. 6. The first, primary holding was that the "federal Indian common law" authorizes the application of State gambling laws on Indian reservations. 461 A.2d at 482-487.

Seneca-Cayuga is distinguishable, the Tribes argue, because the Oklahoma Court "reserved judgment" on the question whether the State can prohibit the tribal games and "remanded" the case for further "balancing of interests." Tribe Br. 13. In fact, the Oklahoma Court held that the State could prohibit the tribal games *if* the games are played primarily by non-Indian patrons, and remanded for determination of that limited question. 711 P.2d at 92, and n. 76. Thus, the Oklahoma Court clearly held that State gambling laws are applicable to tribal bingo operations that cater primarily to non-Indian patrons.

The Tribes assert that, because the *Seneca-Cayuga* decision was so "unpersuasive," a federal district court in Oklahoma subsequently rejected its reasoning in upholding a tribal bingo operation in Oklahoma. Tribe Br. 13-14. This scenario, far from showing that the Oklahoma Court's reasoning is "unpersuasive," shows the necessity for this Court to resolve the conflict among lower courts concerning the issue here.

III

THE BALANCING TEST SUPPORTS THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS HERE

A. The Tribal Interest

The Tribes argue that the balancing test, or "particularized inquiry" test, as applicable in determining state jurisdiction over Indian reservations, does not support the application of State and local gambling laws here. Tribe Br. 17-29. They argue, first, that Indians have "traditionally" gambled on their reservations. *Id.* at 25-29. The Ninth Circuit, however, held that whether Indians have traditionally engaged in the "activity" is irrelevant, and instead ruled that Indian tribes have a "sovereign" right to raise revenue regardless of the form of activity by which the revenue is raised. JS App. 10-11. Thus, the Tribes attempt to sustain the lower decision on narrower grounds than those invoked by the lower court, and indeed do not assert the Ninth Circuit's broad view that tribal revenue-raising interests outweigh State regulatory interests. Moreover, the evidence submitted below shows unequivocally that Indian tribes have *not* traditionally engaged in the kind of activity here, and the district court so agreed.[3]

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[3] The State and County submitted a declaration and report by Professor William J. Wallace, Professor Emeritus at California State University, who stated that Indian tribes have not traditionally conducted high stakes, gambling operations catering primarily to non-Indians, and that tribal economic bases have not traditionally depended on such operations. CR 58, Exh. 16. The Tribes submitted a declaration and report by Professor Lowell Bean, cited extensively in the Tribes' brief, that disagreed with certain minor aspects of Wallace's declaration and report. Tribe Br. 25-27. Significantly, Professor Bean did not challenge Professor Wallace's main conclusion that Indian tribes have not traditionally conducted the kind of gambling activity involved here, but argued only that the tribal bingo operations are an "adaptation" of the cultural tradition. Tribe Br. 26. The district court rejected the Tribes' argument, concluding that Indian tribes have not "traditionally" engaged in the type of activity here. RT 4:10-22.

B. The State Interest

The Tribes argue that there is "no evidence" of organized crime involvement here, and thus that California has no interest in prohibiting the tribal games. Tribe Br. 20. California's interest, however, is in preventing criminal infiltration before it becomes an established fact, not simply correcting the problem after it has occurred. Moreover, contrary to the Tribes' assertion that California "stipulated" to the lack of organized crime here, Tribe Br. 20, the stipulation was carefully drawn to state only the the State and County "do not allege" the presence of organized crime here. CR 54, ¶ 33. The State and County made this stipulation to ensure that the ultimate decision would not turn on whether organized crime exists in the case, a factor that would limit the precedential value of the decision and is irrelevant in any event. Although the Tribes assert that the Cabazon Tribe has an effective security force, Tribe Br. 20, a representative of the U.S. Department of Justice recently declared that "the 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players. . . ." Amici Curiae Brief of *State of Florida, et al.*, at 11.

The Tribes also assert that tribal bingo is not contrary to California "public policy" because California authorizes bingo for charitable purposes, and also authorizes other forms of gambling, such as a State lottery and horse-racing. Tribe Br. 17-19. To the extent that California authorizes gambling, however, California regulates and controls the activity to ensure that organized crime will not gain control of the operation. Charitable bingo, horse-racing, and the State lottery are subject to extensive regulatory controls to preclude organized criminal infiltration. See Cal. Pen. Code § 326.5 (bingo); Cal. Bus. & Prof. Code §§ 19400-19667 (horse-racing); Cal. Govt. Code §§ 8800 *et seq.* (State lottery). The tribal games, however, are not regulated and controlled, and each tribe is free to adopt any form of gambling that it wants and to regulate the gambling as it sees fit. Thus, contrary to the Tribes' argument that California is preventing the Tribes from doing what other entities may do under California law, California subjects *all* gambling in California, where authorized, to extensive regulation and control to prevent organized criminal infiltration. The distinction is not, as the Tribes assert, between "charitable"

and "commercial" bingo, but between regulated and unregulated bingo.

C. The Federal Interest

The Tribes argue that federal policy supports the tribal games here. Tribe Br. 21-23. Congress, however, has not authorized or approved the tribal games, and has not adopted any standards governing them. The Secretary of the Interior does not regulate, supervise, monitor, or otherwise control the games. Thus, no federal regulatory scheme exists here, and no federal policy supports the tribal games here.[4]

IV

THE PENDANCY OF AN INDIAN GAMBLING BILL IN CONGRESS PROVIDES NO BASIS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

Finally, the Tribes argue that Congress "has studied this issue and is moving rapidly to enact legislation" authorizing Indian tribes to operate bingo free of state legislation. Tribe Br. 7. The House of Representatives has approved a bill, H.R. 1920, that would authorize certain forms of Indian gambling, including bingo, and the bill is pending in the Senate. Even if Congress were "moving rapidly" to enact the legislation, this political development would provide no basis for affirming the lower decision or dismissing the appeal for want of a substantial federal question, since both methods of disposition constitute a ruling on the merits. See, *e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 345 (1975). Moreover, contrary to the Tribes' assertion that Congress is "moving rapidly" to enact the bill, the most recent information

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[4] The presidential policy statement cited in the Tribes' brief states only that Indians are to be encouraged in economic development, Tribe Br. 21, but does not indicate that this goal is to be achieved by gambling operations that violate state and local laws. The two declarations by officials of the U.S. Bureau of Indian Affairs cited by the Tribes, Tribe Br. 22-23, although expressing general support for the tribal position, are not the equivalent of a federal regulatory scheme, and cannot be regarded as a definitive statement of federal policy in any event.

available to us indicates that Senate approval is doubtful because of growing opposition both from the states and from various Indian tribes. Therefore, it would not be appropriate to grant the motion to dismiss or affirm on the doubtful contingency that the Senate will approve the bill.

Further, this case presents broad questions concerning state jurisdiction over Indian reservations that transcend the gambling context in which the case arises, and H.R. 1920, which is limited to gambling, does not purport to address these broad questions. As Washington duly notes in its amicus brief, the case raises the broad question whether Indian tribes can market products and engage in other activity in violation of state and local laws. The Ninth Circuit held that Indian tribes have a sovereign right to raise revenue by marketing products to non-Indians, and that this sovereign right exists apart from whether the "activity" itself is within the tribal tradition. JS App. 10-11. The Ninth Circuit decision is thus much broader than the gambling question. Also, this case presents an opportunity for this Court to resolve the conflict between its decisions in *Rice* and *Bryan*, JS 14-15, a conflict that transcends the gambling question. This case is devoid of extraneous factual matter that might prevent a determination of these significant Indian law questions. Therefore, this case presents fundamental questions concerning state and tribal relationships that is broader than the gambling question.

Further, H.R. 1920 is premised on an interpretation of federal Indian law that is in issue here. As the Tribes note, the bill declares, as its premise, that Indian tribes have an "exclusive right" to conduct gambling operations except where "specifically prohibited" by federal law or where contrary to state "public policy." Tribe Br. 9. Thus, the bill assumes the validity of the Ninth Circuit's "public policy" test, and the validity of that test is in issue here. Indeed, Representative Udall, the primary author of the bill, argued in the House that the bill does not establish new principles of federal Indian law, but instead simply incorporates the principles already established by the federal courts. Representative Udall stated:

> "It should clearly be understood that H.R. 1920 does not make gambling on Indian reservations legal. The federal courts have held that gambling on Indian reservations is legal and not subject to state licensing and regulations where the state makes that gambling activity legal under its laws. *H.R. 1920 accepts the state of the law.*
>
> "What it does is to impose federal standards on those activities which are otherwise determined to be legal under existing federal-Indian law." 132 Cong. Rec. H 2016, 99th Cong., 2d Sess. (April 21, 1986) (emphasis added).

Therefore, H.R. 1920 assumes the validity of the Ninth Circuit decision here, which is the very issue raised here. It would be appropriate for this Court to provide guidance to Congress concerning the proper common law relationship between the states and Indian tribes.

Finally, even if H.R. 1920 is enacted, the bill would not resolve the immediate question here. The bill, as noted above, adopts the Ninth Circuit's "public policy" test, which is an outgrowth of *Bryan's* "civil regulatory-criminal prohibitory" distinction. Therefore, even if the bill is enacted, this Court will still need to determine whether California's gambling laws are "civil regulatory" or "criminal prohibitory," and whether such laws are supported by State "public policy."

For these reasons, this Court should note probable jurisdiction and resolve the matter in the normal course. Alternatively, the Court may wish to note probable jurisdiction and defer consideration on the merits until the Senate has had an opportunity to act on H.R. 1920. The Court should not grant the motion to dismiss or affirm since such disposition is a ruling on the merits.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and set the matter for plenary consideration.

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No. 85-1708

In The

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals
For the Ninth Circuit

AMICI CURIAE BRIEF OF STATES OF FLORIDA, ALASKA, CONNECTICUT, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN, AND WYOMING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

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STATEMENT OF INTEREST

The amici states have a significant interest in the issues presented here. All amici states have Indian lands located within their borders.[1] On some Indian lands, Indian tribes are conducting high stakes gambling operations, or have indicated an intention to do so. On other Indian lands, it is expected that Indian tribes may initiate gambling operations because of the increasingly popular nature of this form of activity as a means of raising tribal revenue. As of 1985, at least 100 tribal gambling operations were in effect in 19 states. Jurisdictional Statement ("JS"), 4. Given the increased prevalence of the activity, the present figure is probably much higher.

Most tribal gambling operations consist of high stakes bingo. Typically, the tribe hires a non-Indian professional operator to conduct the games, who receives a percentage of the profits. The jackpots are often very large, frequently consisting of cars or cash awards of thousands of dollars. The games attract, and are intended to attract, non-Indians who reside off the reservation and who cannot lawfully play high stakes bingo elsewhere in the state. Indeed, hundreds of non-Indians typically play the games each night. The games would not be financially profitable if they did not attract non-Indians.

The Ninth Circuit decision impairs the states' legitimate interest in preventing high stakes commercial gambling. The commercial games potentially attract organized criminal elements because they feature high stakes and are not regulated by the federal government. The

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[1]In Ohio, there are no Indian reservations, but one Indian tribe is seeking federal recognition for purposes of conducting bingo operations.

Ninth Circuit held that Indian tribes have a sovereign right to conduct the games even though the games violate state law and are profitable only because they attract non-Indian patrons. Significantly, the Ninth Circuit held that federal law does not preempt state gambling laws as applied on Indian reservations. JS App. 7. Instead, the court held that Indian tribes have a sovereign right to play the games. *Id.* at 7-11. In holding that Indian tribes have a sovereign right, the court did not determine whether commercial gambling is a "traditional" form of tribal activity. Instead, the court ruled that Indian tribes have a sovereign right to raise revenue, and that the tribal revenue-raising interest outweighs legitimate state regulatory interests. *Id.* at 10-11.

The Ninth Circuit decision is not consistent with this Court's recent decisions concerning state jurisdiction over Indian reservations. This Court has never held that tribal revenue-raising interests outweigh legitimate state regulatory interests, particularly where the tribal activity depends on non-Indian patronage and where federal law does not preempt state law. To the contrary, this Court has held that Indian tribes do not have a sovereign right to engage in commercial intercourse with non-Indians in violation of state law. See *Rice v. Rehner,* 463 U.S. 713 (1983); *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134 (1980). Accordingly, this Court should grant review to properly weigh and consider state, federal, and tribal interests. A proper balance, it is submitted, supports the state's right to apply its gambling laws on Indian reservations here.

———o———

REASONS FOR GRANTING PLENARY REVIEW

I. THE COURT OF APPEALS DECISION IMPROPERLY BALANCES STATE, FEDERAL, AND TRIBAL INTERESTS RELEVANT TO INDIAN COMMERCIAL GAMBLING.

Federal Indian law has evolved from the early day when this Court held, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), that Indian reservations are analogous to foreign nations whose boundaries are impenetrable by state laws. Today, the Court takes a more flexible view of state and tribal relationships. Under the modern view, state laws are applicable on Indian reservations unless they are preempted by federal law or infringe on tribal sovereignty. See, *e.g.*, *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-75 (1962). Increasingly, the focus is on federal preemption rather than tribal sovereignty. "The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards reliance on federal preemption." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues, . . ., but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172; see also *Rice*, 463 U.S. at 718.

The preemption analysis in Indian law is different than the preemption analysis in other contexts. "The unique historical origins of tribal sovereignty render ordinary preemption analysis unhelpful in Indian law cases." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,

143 (1980). In undertaking the preemption analysis, the Court instead balances state, federal, and tribal interests. The question turns on a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." *Id.* at 145.

In *Rice v. Rehner, supra,* 463 U.S. 713, this Court held that the tribal "tradition" is highly relevant in balancing state, federal, and tribal interests. If a sovereign tribal tradition exists, state laws cannot be applied unless Congress clearly authorizes their application, or unless the balancing of competing interests otherwise supports the application of state law. *Rice,* 463 U.S. at 719, 720. If, however, a sovereign tribal tradition does not exist, the "backdrop" of tribal sovereignty is accorded "less weight." *Id.*

The Ninth Circuit below properly held that the balancing test, or "particularized inquiry" test, is a form of "federal common law" because it is a judicial doctrine rather than a constitutional or statutory one. JS App. 6, & n. 6. Therefore, Congress can "preempt" or displace the common law balancing test by enacting legislation defining state jurisdiction over Indian reservations. Cf. *Milwaukee v. Illinois,* 451 U.S. 304, 313-314 (1981) (holding that Congress has displaced federal common law of nuisance by enacting Clean Water Act). The federal common law applies only in a "few and restricted instances" where Congress has not legislated and where the application of state law would impair an important federal interest or policy. *Milwaukee,* 451 U.S. at 313-314. The Ninth Circuit held that Congress has not preempted state gambling laws on Indian reservations, or otherwise indicated wheth-

er they apply, and thus that the federal common law applies here. JS App. 6-7, & n. 6.

In applying the common law balancing test, however, the Ninth Circuit failed to follow the guidelines established by this Court, most notably in *Rice*. The Ninth Circuit improperly expanded tribal sovereignty by defining it in economic terms rather than in terms of Indian conduct, and by holding that Indian tribes can take commercial advantage of state gambling prohibitions by marketing to non-Indians the very product that is prohibited. This Court has never suggested such an expansive interpretation of tribal sovereignty. The Ninth Circuit decision skews a proper balance and accommodation of state, federal, and tribal interests, and this Court should grant review to properly weigh such interests.

A. The Tribal Interest.

The Ninth Circuit improperly considered tribal interests in several major respects. First, the Ninth Circuit acknowledged that federal law does not preempt state gambling laws. JS App. 7. This case is thus different from other Indian law cases where state laws have been invalidated on preemption grounds. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. 136; *McClanahan v. Arizona State Tax Comm'n*, *supra*, 411 U.S 164. Instead, the Ninth Circuit held that Indian tribes have an "inherent sovereign right" to conduct gambling operations in violation of state laws. JS App. 9-11. The court thus rested its decision on tribal sovereignty grounds, not preemption grounds. This result departs from the modern "trend" away from tribal sovereignty and towards federal preemption as a bar to state jurisdiction over Indian

reservations, under which tribal sovereignty provides a "backdrop" for the preemption analysis. See, *e.g.*, *Rice*, 463 U.S. at 718.

Further, in holding that Indian tribes have a sovereign right to conduct gambling operations even where federal law does not preempt state law, the Ninth Circuit failed to consider whether Indian commercial gambling is a "traditional" form of tribal activity. Indeed, the Ninth Circuit ruled that the inquiry was irrelevant. JS App. 11. The court ruled instead that Indian tribes have a "sovereign" right to "raise revenue," and that the tribal revenue-raising interest "outweighs" the state's regulatory interest. *Id.* at 10-11. In effect, the court held that the tribal revenue-raising interest is sufficient regardless of the means by which the revenue is raised. The court considered tribal sovereignty solely in economic terms rather than in terms of Indian conduct. This approach fails to consider whether the tribal *activity* itself is linked to historical culture and customs, an inquiry that is most relevant in balancing state and tribal interests. The Ninth Circuit approach would apparently sanction any form of tribal commercial activity that raises revenue, even where the activity is clearly outside the tribal tradition.

The Ninth Circuit decision is inconsistent with this Court's recent decision in *Rice*, which holds that the tribal "tradition"—as determined by the tribal activity—is highly relevant in balancing state and tribal interests. 463 U.S. at 720-725. It is clear that Indian tribes have not *traditionally* conducted high stakes gambling operations for the benefit of non-Indians, particularly where the operations violate state laws. Such operations are not indige-

nous to the tribal culture, nor tied to historical custom or practice. Thus, the Ninth Circuit failed to undertake the inquiry that, according to *Rice,* is *the* most important inquiry in determining state and tribal relationships.

Additionally, the Ninth Circuit failed to properly consider that the tribal activity here involves non-Indians, in that the games are "predominantly" played by non-Indians. JS App. 2. This Court has held in recent cases that Indian tribes do not have a "vested right" to make sales to non-Indians, and that principles of tribal sovereignty do not support their right to make such sales. See *Rice,* 463 U.S. at 721 n. 7, quoting from *Washington v. Confederated Tribes of the Colville Reservation (Colville),* 447 U.S. 134, 151, & n. 27 (1980). It is one thing when Indian tribes develop reservation resources by means that do not depend on non-Indian involvement. It is entirely different when Indian tribes embark on commercial ventures that solicit and depend on non-Indian patronage. The state interest is strongest, and the tribal interest weakes, in the latter situation.

Finally, and most importantly, the Ninth Circuit failed to consider that the tribal gambling operations, beyond depending on non-Indian patronage, are profitable primarily because they are illegal under state law. The tribal games afford non-Indians a product—high stakes bingo—that they cannot lawfully obtain elsewhere in the state. Certainly the hundreds of non-Indians who travel to the reservations each night to play the games would take their patronage to other, more local establishments if the state legalized high stakes bingo throughout the state. Thus, the tribes are taking commercial advantage

of state gambling prohibitions by marketing to non-Indians the very product that is prohibited. The state, by prohibiting the product, has created the very market that the tribes seek to exploit. The situation would be different if the tribal games were able to succeed on their own merits, independently of state gambling restrictions. Such is not the case, however. The Ninth Circuit's decision thus conflicts with this Court's decision in *Colville, supra,* 447 U.S. 134, which holds that Indian tribes cannot "market an exemption" from state laws to non-Indians, particularly where the market exists only because of state restrictions against non-Indians. 447 U.S. at 155, 157.

It is thus clear that the Ninth Circuit decision expands tribal sovereignty beyond limits ever recognized by this Court, and indeed beyond any proper accommodation of state and tribal interests. The decision allows Indian tribes to market a product—high stakes bingo—to non-Indians in violation of state law, even though state gambling prohibitions have created the market and even though federal law does not preempt state law. The Ninth Circuit, unable to rest its decision on preemption grounds, instead held that Indian tribes have a "sovereign" right to raise revenue—regardless of the form of activity by which the revenue is raised—and that tribal revenue-raising interests outweigh legitimate state regulatory interests. The Ninth Circuit decision simply departs from modern federal Indian jurisprudence, and is more akin to the now discredited *Worcester* principle that state laws cannot be applied on Indian reservations under any circumstances. The decision is not consistent with the "accommodation" of state, federal, and tribal interests that

underlies modern federal Indian law. See *Rice,* 463 U.S. at 719.

A sounder analysis of the issues presented here is found in *Penobscot Nation v. Stilphen,* 461 A.2d 478 (Me. Sup. Jud. Ct.), *appeal dismissed,* 464 U.S. 923 (1983), and *Oklahoma v. Seneca-Cayuga Tribe,* 711 P.2d 77 (Okla. Sup. Ct. 1985), both of which hold that state laws prohibiting commercial gambling apply to tribal bingo operations. In *Penobscot,* the Maine Court held that, under the balancing test, state interests outweigh tribal interests because the Indian tribes are attempting to "market an exemption" from state laws to non-Indians, and the tribes would have "nothing to 'sell' " if the state did not prohibit high stakes bingo. 461 A.2d at 482-487. The Court also held that commercial gambling activities have played no part in tribal "historical culture and development." *Id.* at 490. The Oklahoma Supreme Court followed a similar analysis in holding that the State of Oklahoma has the right to prohibit tribal bingo games. *Seneca-Cayuga, supra,* 711 P.2d 77. According to the Oklahoma Court, "no one would deny that states have a legitimate interest in preventing infiltration of organized crime and in protecting the State's overall economy and tax base." 711 P.2d at 91 (emphasis added). The tribes, the Court stated, are to be encouraged in economic development, "but not at the expense of the states in which they reside and in disregard of those laws that protect both Indian and non-Indian citizens." *Id.* The Maine and Oklahoma decisions, it is submitted, reflect the "accommodation" of state, federal, and tribal interests that underlies modern federal Indian law. See *Rice,* 463 U.S. at 719.

The Ninth Circuit decision, although primarily focusing on tribal bingo operations, is not confined to this form of gambling activity. The decision also applies to the Riverside County ordinance prohibiting card parlor games. JS App. 2 n. 1. The Ninth Circuit stated that it found "no basis upon which to distinguish" these two forms of gambling. *Id.* If there is no basis for distinguishing the two gambling activities involved here, there may be no basis for distinguishing other forms of gambling as well. Thus, the Ninth Circuit decision appears to legitimize *any* form of tribal gambling activity, and thus transcends the bingo context primarily involved here.

B. The State Interest.

As noted above, the state interest arises because the tribal gambling operations cater to non-Indian patrons who cannot lawfully play high stakes bingo elsewhere in the state. The operations take commercial advantage of state gambling restrictions against non-Indians. The state interest, according to this Court. is entitled to greatest deference where the tribal activity involves non-Indians *Rice,* 463 U.S. at 720-721, & n. 7.

The state also has an interest in preventing organized criminal elements from gaining control of the tribal games. The possibility of criminal infiltration is real and substantial, because the high stakes that attract non-Indian patrons also attract organized crime. The federal government does not regulate or control the games. The combination of high stakes and lack of regulation creates a risk of organized criminal infiltration.

The U. S. Department of Justice recently testified before a congressional committee that Indian tribes lack the

law enforcement capability to ensure that high stakes bingo operations are not controlled by organized crime. According to the Department of Justice testimony:

> "The attraction that high stakes gambling has for criminal elements should be readily apparent. . . . It involves a large number of fast moving cash transactions. The opportunities for 'skimming' and 'laundering' are enormous. Employees and managers can be corrupted into dishonest manipulations. Large-scale gambling operations require significant support services, such as security, food, cleaning, sanitation and transportation. Every one of these fringe operations can be lucrative and can attract racketeers who preserve their competitive edge by violence and intimidation. . . .
>
> * * *
>
> "*Although the tribes are recognized as governments, they do not have the authority or resources to police these types of activities. The 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players. . . .*
>
> * * *
>
> "The Interior Department is in no position to assume the needed regulatory role, which in many respects, would be inconsistent with its mission and function." See "Gambling on Indian Reservations and Lands." *Hearing Before the Select Committee on Indian Affairs, U. S. Senate, on S. 902,* 99th Cong., 1st Sess. 140, 143, 144 (1985) (testimony of Deputy Assistant Attorney General Mark M. Richard) (emphasis added).

The Ninth Circuit held that the state interest is "weak" because there is "no evidence" that the tribal games here are controlled by organized crime. JS App. 8. The state interest in preventing organized criminal infiltration, however, exists apart from whether a particu-

lar operation is controlled by organized crime. The state interest lies in *preventing* criminal infiltration, not simply *correcting* the problem after it has taken root. It is easier for a state to prevent organized criminal control before it has become an accomplished fact. The practical reality is that the state often cannot detect an organized criminal operation unless it can screen operators, audit books, and exert the full force of its law enforcement apparatus. The Ninth Circuit decision prevents all such forms of state action.

The Ninth Circuit also held that the state interest is "weak" because state gambling laws are applied to Indian "operations" rather than non-Indian participation. JS App. 8. The distinction between operation and participation is one of form rather than substance, because regulation of either has the same effect on the tribal activity. The states apply their laws to operators because the operators control the games, and hence are most likely to be controlled by organized crime. Moreover, it is difficult to regulate participants, because it is not known whether a non-Indian exiting a reservation has participated in the gambling operation or not. In any event, the tribal activity involves non-Indians regardless of whether the state regulates operators or participants. For this reason, the Ninth Circuit's distinction between operators and participants is not relevant to the underlying state and tribal interests involved here.

C. The Federal Interest.

Congress has specifically provided that state gambling laws apply on Indian reservations. The Organized Crime Control Act (OCCA), 84 Stat. 937 (1970), 18 U.S.C. § 1955,

prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." The OCCA expresses a federal policy in support of state jurisdiction over Indian gambling operations. To be sure, current federal Indian policy, as expressed in President Reagan's policy statement and other federal laws, also favors tribal economic development. JS App. 8. Nothing in federal policy, however, suggests that this laudable goal is to be achieved by commercial gambling operations that violate the laws of the surrounding state, particularly where the gambling operations are successful *because* they violate state laws. Therefore, notwithstanding the general federal policy in favor of tribal economic development, federal policy *specifically* recognizes the states' authority to apply their gambling laws on federal lands, including Indian reservations.

The tribal activity here is bereft of the federal interest and involvement that has posed an obstacle to state jurisdiction over Indian reservations in other cases. In *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136, this Court held that Arizona lacked jurisdiction to apply its timber harvesting laws on Indian reservations because Congress had developed a "comprehensive" regulatory scheme, and because the Bureau of Indian Affairs was regulating on-reservation harvesting on a regular basis. 448 U.S. at 145-148. In *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983), this Court held that New Mexico lacked jurisdiction to regulate non-Indian fishing on an Indian reservation because the federal government and the tribe had carefully worked out their own regulatory program. Here, Congress has never enacted a statute or adopted a policy authorizing Indian commercial gambling.

and no federal agency or officer regulates, supervises, or monitors the games. The tribal activity here is purely unilateral.

II. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH STATE COURT DECISIONS HOLDING THAT STATE GAMBLING LAWS APPLY ON INDIAN RESERVATIONS.

As noted earlier, the highest courts of the States of Maine and Oklahoma have held that state gambling laws apply on Indian lands. See *Penobscot Nation v. Stilphen*, *supra*, 461 A.2d 478; *Oklahoma v. Seneca-Cayuga Tribe*, *supra*, 711 P.2d 77. Both courts, applying the common law balancing test, concluded that the balance of competing interests supports the application of state gambling laws on Indian lands. The Ninth Circuit decision here conflicts with both decisions, although neither is mentioned in its decision.

To be sure, the Fifth Circuit and the Ninth Circuit in an earlier decision held that Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1163, 28 U.S.C. § 1360, does not permit state gambling laws to be applied on Indian reservations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).[2] Both decisions, how-

---

[2]Public Law 280 provides that, in California and several other states, "those *civil* laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory," and that "the *criminal* laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." JS App. 23-25 (emphasis added).

ever, were limited to the narrow question whether a federal statute—Public Law 280—permits state laws to be applied and neither decision applied the common law balancing test. Thus, both decisions are inapposite to the common law issue arising here. The Ninth Circuit decision is the only appellate decision holding that the common law balancing test does *not* permit state gambling laws to be applied on Indian reservations, and directly conflicts with the Maine and Oklahoma decisions in *Penobscot* and *Seneca-Cayuga,* which hold to the contrary. This Court should grant review to resolve this conflict.

This Court dismissed the tribal appeal from the Maine Court's decision in *Penobscot* "for want of a substantial federal question." 464 U.S. 923 (1983). Although a denial of certiorari, such as occurred in *Seminole* and *Barona,* does not constitute binding precedent, the dismissal of an appeal for want of a substantial federal question constitutes a disposition on the merits. *Hicks v. Miranda,* 422 U.S. 332, 345 (1975). For this reason, a representative of the U. S. Department of Justice, in recent congressional testimony, referred to *Penobscot* as "a recent Supreme Court decision," and stated that this Court's dismissal of the tribal appeal in that case "suggests that in such cases state regulatory law is applicable." See "Gambling on Indian Reservations and Lands," *Hearing before the Select Committee on Indian Affairs, U. S. Senate, on S. 902,* 99th Cong., 1st Sess. 145-146 (1985) (testimony of Deputy Assistant Attorney General Mark M. Richard). The Ninth Circuit decision thus conflicts with this Court's own decision in *Penobscot.*

III. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT THE BALANCING TEST RATHER THAN THE "CIVIL REGULATORY-CRIMINAL PROHIBITORY" TEST APPLIES IN DETERMINING WHETHER STATE REGULATORY LAWS APPLY ON INDIAN RESERVATIONS.

Turning to the Public Law 280 issue, the Ninth Circuit below followed the Fifth and Ninth Circuit decisions in *Seminole Tribe v. Butterworth, supra,* and *Barona Group v. Duffy, supra,* which hold that Public Law 280 does not authorize state and local governments to apply their gambling laws on Indian reservations. In *Seminole* and *Barona,* the courts fashioned a legal theory premised on this Court's ruling in a tax case, *Bryan v. Itasca County,* 426 U.S. 373 (1976). Under this theory, state "criminal prohibitory" laws can be applied on Indian reservations, but not state "civil regulatory" laws. Thus, state gambling laws can be applied on Indian reservations only if the state "prohibits" all gaming as a "criminal" matter, rather than "regulates" gaming by licensing it. In other words, in the absence of a *per se* prohibition of a particular activity, the law is necessary "civil regulatory" in nature. In *Seminole* and *Barona,* the Fifth and Ninth Circuits held that state gambling laws are "civil regulatory" and therefore not included under Public Law 280.

The "civil regulatory-criminal prohibitory" dichotomy is a highly mechanical standard that fails to consider the state's legitimate interest in regulating certain kinds of conduct. Indeed, the standard absolutely prohibits state regulation of conduct on Indian reservations, no matter how compelling the state interest or how tangential or re-

mote the tribal interest. The balancing test adopted in *Rice v. Rehner, supra*, on the other hand, accommodates legitimate state law enforcement and policy concerns by providing that such concerns must be weighed against tribal concerns. The general canon of construction that requires ambiguities in federal laws to be construed favorably to Indians, *e.g., Antoine v. Washington*, 420 U.S. 194, 199 (1975), provides sufficient protection of tribal interests, without additionally prohibiting state regulation of on-reservation conduct regardless of the legitimacy of the state interest. As noted earlier, the highest courts of the States of Maine and Oklahoma invoked the balancing test in holding that the states' interest in preventing organized criminal control outweighs the tribal interest in raising revenue, particularly where the tribal activity depends on non-Indian involvement and is not a traditional form of tribal activity. Therefore, it is submitted that the balancing test, not the "civil regulatory-criminal prohibitory" dichotomy, provides the proper accommodation and adjustment of state and tribal concerns here.

———o———

CONCLUSION

The amici curiae states respectfully request that this Court note probable jurisdiction and grant plenary consideration.

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No. 85-1708

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

STATE OF CALIFORNIA, et al.,

Appellants,

v.

CABAZON BAND OF MISSION INDIANS, et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

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BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF THE STATE OF WASHINGTON AS AMICUS CURIAE

In the State of Washington there are twenty-five Indian reservations. Taken as a whole, the population of these reservations is predominantly non-Indian. According to 1980 federal census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians and the rest, some 63,000, are non-Indians.[1]

[1] Two of the twenty-five have no population at all. For reservation-by-reservation population figures, see General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," pp. 1-300 through 1-303.

Moreover, many of these reservations are located in the Puget Sound area, the State's major population center. As would be expected, it is on these reservations that the Indian gambling problem has primarily developed. There are three Indian bingo operations on the Puyallup Reservation, which is located within and adjacent to the City of Tacoma, and one each on the Muckleshoot, Tulalip, and Swinomish Reservations. None of these operations, of course, comply with state law, and they all cater to a predominantly non-Indian clientele.

Further, we would expect the attraction of economic gains to result in Tribes expanding their efforts to exploit their proximity to a large non-Indian market. This may well include utilization of other revenue sources than gambling.

Hence Washington's great interest in this case.

REASONS FOR GRANTING PLENARY REVIEW

Even when viewed narrowly, the Question Presented in this case is substantial and of nationwide importance. As pointed out in California's Jurisdictional Statement and in the amicus brief of Florida and other states, there are over 100 Indian gambling operations spread over 19 states. And the Supreme Courts of Maine and Oklahoma are in conflict with the Court of Appeals for the Fifth and Ninth Circuits on the question of the applicability of state law to those operations. We concur fully with the views expressed in the Jurisdictional Statement and the Florida amicus brief, and need not repeat them here.

We submit this separate brief, however, in order to add a somewhat different and perhaps broader perspective on the Question Presented. The gambling problem is but one part of a larger problem which Washington and many of her sister states are encountering. This larger problem stems from the efforts of various sorts by Indian tribes to utilize their asserted immunity from state law, together with their proximity to non-Indian neighbors, for at least

three purposes. The first is to confer on non-Indians an immunity from state tax laws. The second is to shield certain types of conduct from the reach of state law. And the third is to market to non-Indians, such as the non-Indian operators of bingo games, the economic benefit of the Tribe's own immunity.

With respect to the first purpose, those efforts have included sales of untaxed cigarettes and liquor to non-Indians, and have been unsuccessful. See *Confederated Tribes of the Colville Reservation, supra,* and *Rice v Rehner,* 463 U.S. 713 (1983). With respect to the second, those efforts have included sales of dangerous fireworks that are illegal under state law. See *United States v. Marcyes,* 557 F.2d 1361 (9th Cir. 1977). And they may include in the future such things as tribal sheltering of non-Indian businesses from state environmental laws, *e.g.,* laws controlling disposal of hazardous wastes.

In these gambling cases, as with fireworks and hazardous waste, the states are not trying to protect a source of state revenue. Rather, they are trying to protect their own citizens from a serious social danger. The tribal immunity from state law is being used for both the second and third purposes, i.e., to shield not only the players but also the non-Indian professional operators of gambling games who share a large part of the profits.

One would hope that the lower courts, in dealing with these problems in the future, could be guided by clear, workable principles of law. But the conflict that exists between the State Supreme Courts and the Federal Courts of Appeal on the Indian gambling question surely reflects the fact that clear guidance of this sort is not yet available. The reason for the conflict is even more important than the fact of its existence.

This case is an opportunity to provide this much needed guidance. And that is an additional reason for granting plenary review.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

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No. 85-1708

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October Term, 1985

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Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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1. DOCKET ENTRIES (FEDERAL DISTRICT COURT)

83-1117

CABAZON MISSION INDIANS-v-RIVERSIDE CO.

DATE	NR.	PROCEEDINGS
2/23/83 lp	1.	Fld complnt. Issd sumns. Case may be referred to Mag Kronenberg for discvry. LODGED proposed OSC re prel inj & TRO.
2/28/83 sb	2.	Fld pltf proof of serv sumns & complt etc on Ben Clark on 1-25-83
	3.	Fld pltf proof of serv sumns & complt etc to County of Riverside Ca Sec on 1-25-83
	4.	Fld retn Proof of serv
2/24/83 sb	5.	MIN ORD: HRG TRO ert ord that the TRO will issue as to both the poker & bingo operations Matter set fr hrg on prelim inj 3-4-83 1:30 p.m. deft opp due NLT 4 p.m. 3-1-83 pltf reply NLT 9 a.m. 3-3-83
sb	6.	Fld Ord (CHH) OSC re prelim inj no date shown & on bond due & OSC re prelim inj & TRO serv to each deft NLT 2-25-83 noon
2/23/83 sb	7.	Fld Ord (LEW, CHH) transfring actn to cal of Judge Laughlin E. Waters fr all fur pr proceeding. Case may be ref to Mag Tassopulos fr disc. cc ptys
3/ 2/83 gth	8.	MIN ORD: ORD that hrg on prelim inj be cont to 3/10/83, 1:30 p.m.
	9.	Fld defts opp to OSC re prelim inj.

DATE	NR.	PROCEEDINGS
3/ 7/83 gth	10.	Fld pltfs reply memo in suppt of prelim inj.
3/10/83 sb	11.	Fld deft supplemental memo of P/A in opp to prelim inj.
	12.	MIN ORD: crt cont matter prelim inj yo 5-5-83 9 a.m.
	13.	Fld deft decar of Jerome Tohave supperindent of Burear of Indain Affair.
	14.	Fld deft delcar of Leroy Alvarez.
	15.	Fld deft delcar of Lainda Streeter.
	16.	Fld deft delcar of Joseph Benitez.
	17.	Fld deft delcar of Callaway.
	18.	Fld deft delcar of Marc Benitez.
3/24/83 wa	19.	Fld defts ANSWER TO CMPLT.
3/22/83 wa	20.	Fld Stip & ORD (LEW) that defts Cnty of Riverside & Ben Clark shall hv up to & including 3/24/83, to file their respo to cmplt.
4/ 7/83 wa	21.	MIN ORD: Note that hrng re fur procdgs on prelim inj set fr 5/5/83, 9 A.M. is cont'd to hrng on 5/5/83, 1:30 P.M.
4/13/83 wa	22.	Fld Stip & ORD (LEW) that following briefing schedule is hereby adopted w/ regard to hrng in this mttr now set fr 5/5/83, 1:30 P.M.
4/18/83 wa	23.	Fld defts' 2nd suppl memo of P&A in opp to applic fr prelim inj.
wa	24.	Fld pltf's suppl memo in suppt of prelim inj.
4/22/83 wa	25.	Fld pltf's reply memo to deft's 2nd suppl memo of P&A in opp to applic fr prelim inj.

DATE	NR.	PROCEEDINGS
4/25/83	wa 26.	Fld pltf's addendum to reply memo.
4/29/83	wa 27.	MIN ORD: Crt's own motn that hrng on prelim inj set on cal fr 5/5/83, has been cont'd to 5/6/83, 9 A.M.
5/ 9/83	rib 28.	Fld prelim inj & ORD (LEW) that pend trial herein defts are enjoined & restrained frm enforcing Co ordinance #331 & 558 agnst plf & fur Ord that bond be fixed in amt of $50,000.00. (Ent 5/10/83 ntfd prtys).
5/ 6/83	wa 29.	MIN ORD: Crt hrs oral argumnt of cnsl & ords that a prelim inj shall iss. Crt will sign prop perlin inj. lodged by cnsl. Crt's exh 1 is marked fr ID & admitted into evidence. Exh is a lttr rec'd by Crt frm The Lou Watts Co.
	wa 30.	Fld Crt's mandatry stat conf cal 6/20/83, 1:30 P.M.
5/19/83	wa 31.	Fld bond for Undertkng under R. 65(c) of FRCP in the amt of $50,000.00 frm The Aetna Causalty & Surety Co.
5/25/83	wa 32.	Fld proof of serv of Undrtkng R. 65(c) srvd Glenn R. Salter, Esq. on 5/25/83.
6/10/83	wa 33.	Fld joint stat reprt.
6/20/83	wa 34.	MIN ORD: cnsl to file docs by 7/29/83. Mttr will then stand subm until fur ord by crt.
7/11/83	wa 35.	Verificatn of AMENDED COMPLAINT, Plaintiff.
7/26/83	wa 36.	Applic & Ord fr lv to amend cmplnt, no hrng reqstd. Plaintiff Amended verified cmplnt fr declratry & inj relief & damages.

DATE	NR.		PROCEEDINGS
8/17/83	wa	37.	ANSWER TO AMENDED COMPLNT. Defendant.
9/26/83	gth	38.	Notc & mtn fr partial S/J retnbl 10/17/83, 9 A.M. MO LDGED prof F/F & conclu & jdmt. DEFT.
9/28/83	gth	39.	Amd proof of srvc of notc & motn fr conslidtn srvd Charld Scott, Barbara Karsmer, Glenn Feldman Atty genl Van de Kamp. 9/26/83. Defts.
10/ 5/83	gth	40.	REspon to motn fr consolidatn. Plaintiff.
10/17/83	lp	41.	Memo of P/A Plaintiff 10/31/83 9 A.M.
10/17/83	lp	42.	statmnt of genuine issues, Plaintiff.
10/31/83	gth	43.	Notc & motn for fr interventn 11/21/83, 9 A.M. State of Calif. LODGED prop ORD. State of Calif.
10/31/83	gth	44.	Purs to lettr 10/24/83 defts motn is w/d & hrg is off cal re S/J. MO.
11/14/83	cw	45.	Ntc of mtn 12/5/83, 9 A.M. for lv to file cntrclm. LODGED prop ord & cntrclm.
11/16/83	gth		LODGED prop ORD grntng motn fr leav to intervene. State of Calif.
11/15/83	cw	46.	Ntc of no opp to mtn for intervention. Plaintiff.
11/25/83	cw	47.	Opp to mtn for lv to file cntrclm. Plaintiff.
12/ 5/83	cw	48.	MO: Defts mtn for lv to file cntrclm argued & denied.
*11/21/83	cw		ORD granting mtn for lv to intervene.
12/20/83	cw		Ntc re MSC set 2-13-84, 1:30 P.M.
1/17/84	cw	51.	Joint rpt of early meeting.
1/31/84	cw	52.	Joint stat rpt.
2/13/84	cw	53.	MO: MSC held.

DATE	NR.	PROCEEDINGS
6/26/94	wh 54.	Agreed upon stmt of uncon fact as between Pltf, defts & deft interv to be usd in X-mots for S/J pltf.
6/29/84	wh 55.	exh in supp of deft's mot for S/J deft.
	56.	Note of hrg 9-24-84 @ 9:00 A.M. deft.
	57.	Mot for S/J deft.
	58.	Memo of P&A in supp of mot for S/J deft.
7/ 2/84	wh 59.	Memo of P&A in supp of pltf's mot for aprtl S/J pltf.
	60.	Pltf's note & mot for partl S/J pltf.
		LODGED stmt of uncon fact & concl of law.
		LODGED propsd S/J.
7/ 6/84	wh 61.	Defts opp to mot of Morongo Band of Mission Indians for lv to fle A/C, 7-16-84, 9:00 A.M. defts.
	62.	Note & mot for S/J pltf Morongo Band of Mission Indians 9-24-84, 9:00 A.M.
		LODGED stmt of uncon fact & concl of law.
		LODGED ord & jgmt.
	63.	Memo of P&A in supp of pltf's mot for S/J pltf Morongo Band of Mission Indians.
7/11/84	wh 64.	Declr of G R Salter deft.
7/17/84	wh 65.	1ST A/C & suppl complt pltf.
7/27/84	wh 66.	Deft's & deft intervenr's reply memo of P&A deft Riverside County.
7/31/84	wh 67.	Rply memo in supp of mot fr partl S/J pltf 9-24-84, 9 A.M.

DATE	NR.	PROCEEDINGS
8/ 1/84	wh 68.	ANS TO 1ST A/C & SUPPL COMPLT of Mogongo Band of Mission Indians deft Cnty of Riverside & B Clark & deft in intervntn State of Calif.
8/ 6/84	am 69.	Pltf Morongo Band of Mission Indians' memo of P&As in opp to defts' mtn for s/j.
8/ 6/84	am 70.	Pltfs' jnt ntc of mtn & mtn to strk declrtns of Patrick H. Hopper & William J. Wallace.
8/ 6/84	am 71.	Memo of P&As in suppt of jnt mtn to strk declrtns of Patrick H. Hopper & William J. Wallace.
8/14/84	wh 72.	EX PARTE applic fr ord ext ti to opp mot deft Riverside Cnty. LODGED ord.
	73.	Declr of R E Walston deft Riverside Cnty.
8/17/84	wh 74.	Deft's opp to pltf's mot to strk declrs deft Riverside Cnty.
8/20/84	wh 75.	ORD ext deft's ti to fle resp to pltf's mot to strk declrs to 8-20-84 deft Riverside.
8/24/84	wh 76.	Applic to fle suppl declr deft Riverside County. LODGED ord.
8/27/84	wh 77.	Pltf's rply memo in supp of jnt mot to strk declrs 9-10-84, 9 A.M.
8/28/84	wh 78.	Pltf Morongo's opp to applic to fle suppl authrties in supp of jnt mot to strk declrs of P Hopper & W Wallace & in supp of pltf's mot fr S/J 9-10-84, 9 A.M.
	79.	ORD GRNTG deft's applic to fle suppl declr to mot fr S/J deft Riverside Cnty.
9/13/84	wh 80.	EX PARTE applic fr ord shrtng ti fr svc of mot to and prelim inj & waivng hrg pltf.

DATE	NR.	PROCEEDINGS
		LODGED ord, mot, memo & declr.
9/10/84	wh 81.	MO: Pltf's joint mot to strk declrs of Hooper & Wallace DEN.
9/14/84	wh 82.	Opp of County defts to req fr modifcatn of P/I issued fr Morongo Band.
9/20/84	wh 83.	Stip & ORD cont hrg on x-mots fr S/J to 11-5-84 @ 9 A.M. deft/intrvenr State of Calif.
9/21/84	wh 84.	Cabazon Band's post hrg memo pltf.
10/ 1/84	wh 85.	Note & mot to amd P/I w/o hrg thereon pltf Morongo.
	86.	ORD tht time fr svc of pltf's mot to amd P/I be shrtned frm 21 to 4 dys.
	87.	ORD tht pltf's mot to amd P/I DEN.
10/ 9/84	kmb 88.	Fld deft-intervenor St of Calif's reply to post-hrg memo of Cabazon band.
10/15/84	cw 89.	Suppl exhs in suppt of mtn for s/j. Pltf.
10/22/84	wh 90.	Memo of P&A in resp to pltf's suppl exh deft Riverside.
	91.	Pltf's jnt memo of P&A w/respct to depo of W J Wallace 11-5-84 @ 9 A.M. pltf.
10/25/84	wh 92.	Deft's reply to pltf's joint memo of P&A w/respct to depo of W J Wallace.
10/30/84	wh 93.	Stip & ORD tht any memo of P&A fld by pltfs must be recvd by defts by 10-22-84; any resp memo by defts must be recvd by pltfs by 10-26-84 @ 12 noon; any reply memo by pltfs must be recvd by defts by 10-29-84 @ 12 noon pltf.
	94.	Pltf's jnt resp to deft's reply memo re Wallace depo & suppl exhs 11-5-84 @ 9 A.M. pltf Morongo.

DATE	NR.	PROCEEDINGS
	95.	EX PARTE applic fr permission to include suppl exh deft Riverside. LODGED ord.
11/ 1/84 wh	96.	ORD grntg ex parte applic tht deft may include suppl exh.
11/ 5/84 wh	97.	MO: Deft's mot fr S/J DEN; pltf's mot fr partl S/J GRNTD.
12/ 5/84 wh	98.	Declr of B E Karshmer re fndgs of fact & concl of law pltf Morongo. LODGED prop ord & prop jgmt.
	99.	Declr of G L Feldman, pltf Cabozon.
	100.	Pltf Cabazon's jnt ex parte applic fr lv to fle objs to addtnl prop fndgs & concl to be submittd by defts or, suggestng tht hrg on mattr be convened.
12/ 6/84 wh	101.	ORD GRNTNG pltf's jnt ex parte applic; pltfs shll srv & fle wrttn objs to any addtnl prop fndgs of fact & concl of law submitted by defts within 5 dys of svc upon pltf. pltf Cabazon Band of Mission Indians.
12/ 6/84 wh	102.	ORD tht mot of pltf Cabazon Band of Mission Indians fr partl S/J agnst defts & deft-intrvenr GRNTD, & mot of defts & deft-intrvenr fr S/J DEN; tht Cal Penl Code 326.5 & Rivrside Cnty Ordnce #558 are of no force & effect on &-within boundries of Cabazon Indian Reservatn agnst Cabazon Band Mission Indians, members or other persons engaging in, or permittd to be played, tribally sponsered bingo games, & defts, deft-intrvnr hv no authrty or jurisdc to attempt or enfrce said Cal Penl Code or Rivrside Cnty Ordnce as to bingo

DATE NR. PROCEEDINGS

games on Cabazon Indian Reservatn, & said defts are hereby perm restraind & enjoind frm tkng steps to enfrce said Penl Code or Cnty ordince within boudries of said Reservatn: tht Cal Penl Code 330-31 & Rivrside Cnty Ordnce #331 are void as within said Reservatn fr members or others frm playing or wagering on tribally sponsered & sanctnd games of draw poker, lowball draw poker, panguingue or othr card games not prohibitd undr Cal Penl Cde 330-31; said defts perm enjoind from any attmpts ¶ enfrcing saif Penl Cde or Cnty Ordnce within Cabazon Reservatn Boundries as to the playing of said tribally sponsered, sancnd games; tht plf to recovr costs of suit herein frm defts, deft-intrvnr; pltf shll hv until 30 dys follwng entry of finl jgmnt on remng dmge claim to fle & srv a single applic fr atty fees & expenses covrng entirety of ths case. (ENT 12-10-84) mld notcs.

12/ 6/84 wh 103. ORD tht pltf Cabazon's mot fr partl S/J GRNTD, deft-intrvnr's mot fr S/J DEN; tht pltf shll recvr costs of suit herein & hv to 30 dys fllowng entry of finl jgmnt to fle & srv single applic fr atty fees & expenses covrng entrity of case; tht grntng pltf's mot fr partl S/J does not dispose of pltf's claim of damage aganst defts, whch calim shll still be adjudc by ths Crt; Crt hs detrmnd tht there is no just reason fr delay & directs tht ths jgmnt be ent. (ENT 12-10-84) mld notcs.

12/17/84 kw 104. Deft obj to prop find/fact & conclusions of law & prop addl conclusion of law (Cabazon Band).

DATE	NR.	PROCEEDINGS
		LODGED PROP ORD.
	105.	Deft obj to prop find/fact & conclusions of law, & prop addl conclusions of law (Morongo Tribe).
12/20/84 wh	106.	Pltf Cabazon's resp to deft's objs to prop fndgs & concl & addtnl prop concl of law. pltf Cabazon.
12/19/84 BC	107.	Fld. NOTC OF APPEAL to the 9th cir C/A frm ord & jdgmnt ent on CV 83-3037-LEW 12/10/84. Forms given Billing letter sent.
12/26/84 wh	108.	Notc of applic to Crk to tax costs: BILL OF COSTS hrg set 1-9-85 @ 1:30 P.M. pltf Cabazon.
1/ 2/85 wh	109.	Stmt of issues deft Rivrside Cnty.
	110.	Cert of waiver of reptr's transcr deft Riverside Cnty.
1/ 7/85 kw	111.	Resp to defts objs to Bill of Costs, pltf.
1/ 8/85 kw	112.	W/drawl of cert of waiver of reptr's transcript (Cabazon) deft.
1/10/85 kw	113.	Pltf Morongo Bank resp to deft objs to Bill of Costs. (PLACED IN FILE NOT USED.)
*1/ 2/85 wh	114.	Objs to bill of costs 1-9-85 @ 1:30 P.M. deft Rivrside.
1/18/85 wh	115.	Fld letter to R Janisch frm K G Griffith dtd 1-17-85 re costs.
2/12/85 kw	116.	STIP & ORD telephonic stat conf on remaing damage claim 3-4-85 11:00 A.M., cnsl fr pltf shal initiate reqrd conf cal; joint stat conf to be fld nlt 10 days prior to hrng.

83-3073

MORONGO BAND-v-RIVERSIDE COUNTY

DATE	NR.	PROCEEDINGS
5/16/84 sb	1.	Fld Complt Issd Sumns.
5/17/83 sb	2.	Fld Ord (LEW) (R) transfring actn to cal of Judge Laughlin E. Waters fr all fur proceeding. Case may be ref to Mag McMahon fr disc. cc ptys.
*5/16/83 bp	3.	Fld ORD (R) that pltf's time for the hrg on the said mot for a prelim injunctn is hereby shortened so that the hrg will occur on 5-20-83 @ 9:00 A.M. & defts will file & srve their opp to the said mot no later than 48 hrs prior to such hrg date.
5/20/83 bp	4.	Fld deft's notc of tkng depos of Liquid Light, Inc. on 5-23-83 @ 10:00 A.M., Judith Walden on 5-23-83 @ 1:30 P.M., Luc Noel on 4-24-83 @ 10:00 A.M., Barry Podwell on 5-25-83 @ 10:00 A.M. Issd (4).
*5/18/83 bp	5.	Fld defts memo of P&As in opp to req for prelim injunctn.
5/20/83 wa	6.	Fld ORD (LEW) pltf's motn fr prelim inj, defts, & each of them, etc. & all those actng in concert w/them are preliminarlily enjoined, pending a final judgmnt frm engaging in any arresting or thereatening to arrest. etc.; interfering w/ or harrassing pltf, etc while or aftr any persons are on Morongo Indian Reservatn & are engaged in playing bingo. (ENT 5-31-83) Mld cpy & notc prtys.

DATE	NR.	PROCEEDINGS
6/ 6/83 bp	7.	Fld defts' ANSWER TO COMPLAINT.
*6/ 3/83 bp	8.	Fld retn of summs, servd Co of Riverside, (person with whom left Nancy Romeo, Auth agent) 5-16-83 & Ben Clark, Sheriff of the Co of Riverside (person with whom left Glenn Salter Auth agent) 5-16-83.
*5/20/83 rlb	9.	MIN ORD (LEW): Hrg re prlm inj: Case called Hrg hld; Crt Grants prelm inj as amended.
7/ 6/83 bp	10.	Fld notc re: Mand Stat Conf set for 9-6-83.
8/19/83 sb	11.	Notc & motn intervention 9-19-83 9 A.M. Statw of Ca.
8/25/83 eg	12.	Stmnt fo no opp to mtn to intervene of State of California Defendant County of Riverside & Ben Clark.
	13.	Joint status report.
8/29/83 sb	14.	Memo of P/A.
9/ 6/83 sb	15.	Mandatory Status Confcont 10-17-83 1:30 P.M. MO.
9/28/83 rlb	16.	Amended proof of srv ntc of mot for partial S/J, etc.
*9/26/83 rlb	17.	Dfts' ntc of mot & mot, rtnble 10/17/83, 9 A.M., for consolidation; memo of p/a.
10/12/83 sb	18.	supplentna memo of P/A in opp to motn fr intervention.
	19.	supplemntal memo of P/A in opp to motn fr intervention.
10/14/83 kw	20.	Stip & ORD contg mot fr consoldaton 10-31-83 9:00 A.M.
*9/27/83 kw	21.	Subst of atty & Ord allowing Barbara E. Karshmer etc Plaintiff.

DATE	NR.	PROCEEDINGS
10/17/83	kw 22.	Cause called; hrg held; State of Cal. fr interventon granted. MO.
10/17/83	cw 23.	Memo of P&A in opp to defts mtn for consol.
10/31/83	kw 24.	answ in intervention state of ca.
10/31/83	am 25.	Fld ORD that State of Calif, through its atty general be permitted to intervene as party deft & ansr in interventn attached to the motn to intervene shall srv as ansr in intervntn in this actn.
10/31/83	am 26.	MIN ORD; Motn to consolidate w/CV 83-1117 is GRANTED. motn to designate the Morongo case as lead case is DENIED; motn fld for S/J set for hrng 11-21-83 is placed off calndr & to be reset by crt.
11/14/83	am 27.	Fld deft note of motn 12-5-83 9 A.M. for leave to fl cntrclaim.
		LODGED prop ord & cntrclaim.
11/25/83	kw 28.	Memo of P&A in opp to deft mot fr lv to fil a contrclaim. Plaintiff.
12/ 5/83	sb 29.	deft motn to fr lv to file counterclaim denied.
6/21/84	as 30.	Memo to P's & A's in suppt of mot to file amended/supplmt complnt. Pltf.
6/21/84	as 31.	Note of mot to file amended/supplmnt complnt. Pltf.
		LODGED ORD.
7/16/84	sa 32.	MIN ORD: Pltfs motn to file amended & supple complt is granted. Ct ords no further discovery to be granted.
7/25/84	sa 33.	ORDER: Amended & supple complt lodged w/said motn be fld, & that defts

DATE	NR.	PROCEEDINGS
		shall have 10 days from the date of this ord in which to file their pleadings in resp. pltf.
7/27/84	sa 34.	Reply memo of P&As. Deft & deft intervenor.
8/17/84	sa 35.	Opp to pltfs motn to strike declarations. deft.
8/23/84	lpc 36.	Memo in reply to deft opp to mot to strk Hopper & Wallace declars-Morongo.
8/24/84	sb 37.	Applic to file supplemental declar.
8/28/84	sb 38.	Ord granting applic to file supplemental delcar.
9/20/84	sa 39.	Stip & ORD x-motns for S/J is cont to 11-5-84 9 A.M.
11/ 5/84	sa 40.	MIN ORD: Pltfs motn for partial S/J is granted.
12/ 6/84	wh 41.	ORD tht mot of pltf Cabazon Band of Mission Indians fr partl S/J agnst defts & deft-intrvenr GRNTD, & mot of defts & deft-intrvnr fr S/J DEN; tht Cal Penl Code 326.5 & Rivrside Cnty Ordnce #558 are of no force & effect on & within boundries of Cabazon Indian Reservtn agnst Cabazon Band Mission Indians, members or other persons engaging in, or permittd to be playd, tribally sponsered bingo games. & defts, deft-intervnr hv no authrty or jurisdctn to attempt or enfrce said Cal Penl Code or Rivrside Cnty Ordnce as to bingo games on Cabazon Indian Reservatn, & said defts are hereby perm restraind & enjoind frm tkng steps to enfrce said Penl Code or Cnty Ordnce within boundries of said Resrvatn; tht Cal Penl

DATE	NR.	PROCEEDINGS
		Code 330-31 & Rivrside Cnty Ordnce #331 are void as within said Resrvatn fr members or others frm playing or wagering on tribally sponsrd & sanctnd games of draw poker, lowball draw poker, panguingue or othr card games not prohibitd undr Cal Penl Cde 330-31; said defts perm enjoind frm any attempts ¶ enfrcng said Penl Code or Cnty Ordnce within Cabazon Resrvatn Boundries as to playing of said tribally sponsered, sancd games; tht pltf to recovr costs of suit herein frm defts, deft-intrvnr; pltf shll hv until 30 dys following entry of finl jgmnt on remaing dmge claim to fle & srv a single applic fr atty fees & expenses covring entirety of ths case (ENT 12-10-84) mld notcs.
	42.	ORD tht pltf Cabazon's mot fr partl S/J GRNTD, deft-intrvnr's mot fr S/J DEN; tht pltf shll recvr costs of suit herein & hv to 30 dys followng entry of fnl jgmnt to fle & srv single applic fr atty fees & expenses covrng entirety of case; tht grntng pltf's mot fr partl S/J does not dispose of pltf's claim of damge aganst defts, whch claim shll still be adjudc by ths Crt; Crt hs detrmnd tht there is no just reason fr delay & directs tht ths jgmnt be ent. (ENT 12-10-84) mld notcs.
12/19/84	BC 43.	Fld NOTC OF APPEAL frm ord & jdgmnt ent 12/10/84. forms mailed. Billing letter sent.
12/26/84	sa 44.	Bill of costs set 1-14-84 10 A.M. against defts. (PLACED IN FILE NOT USED).

DATE	NR.	PROCEEDINGS
1/ 2/85	sa	45. Objections to bill of costs. pltf. (PLACED IN FILE NOT USED).
1/ 8/85	sa	46. W/drawl of certificate of waiver of reporters transcript. deft.
*12/26/84	kw	PLACED in file not used Notc of applic to tax costs pltf.
1/ 2/ 85	kw	PLACED in file not used objs to bill of costs deft.

2. DOCKET ENTRIES (U.S. COURT OF APPEALS)

DATE	FILINGS-PROCEEDINGS
1984	
12/27	Docketed cause and entered appearances of counsel. GJB.
1985	
Jan. 10	Filed as of Jan 7, aplts' (RIVERSIDE COUNTY; STATE OF CALIFORNIA) CADS. (DC #CV-83-1117-LEW) (CONFATT) ¼-rmc-
Jan. 10	Filed as of Jan. 7, aplts' (RIVERSIDE COUNTY; STATE OF CALIFORNIA) CADS. (DC #CV-83-3073-LEW) (CONFATT) ¼-rmc-
Mar. 25	Filed Order (CONFATT, SMJ): Prebriefing Conference held 2/27/85; Aplt's represented by Roderick Walston, Rudolf Corona, Jr., Glenn Salter; Aple's represented by Barbara Karshmer, Glenn Feldman, Peter Strong; Aplt granted extension of time to designate rptr's transcript, designation due in D.C. within 10 dys; Aplt's may file designation of Clk's record within 10 dys after certificate of record is transmitted to this ct; Aplt's shall join in single brief under 50 pgs due MAR. 22, 1985; Aple's shall file single brief under 50 pgs due APR. 26, 1985; Aplt's single reply brief under 25 pgs due within 14 dys of service date of Aple's brief; Service on all briefs will be in person or by overnight mail or courier; order subject to reconsideration if opposition filed within 10 dys.
Apr. 2	Filed as of Mar. 22, orig & 15 Appellant's opening briefs (46-pgs.); 5 Excerpts of Rec. (in 2 vols.). 3/22 Express Mail. ec
Apr. 2	Filed as of 3/22, orig & 33 Appellants' Suggestion For Hearing En Banc; Memorandum in support. 3/22 Express Mail. (Civatt w/copy of opening brief; 2 copies of Suggestion to En Banc Coordinator) ec

DATE	FILINGS-PROCEEDINGS
Apr. 2	Sent ltr to cnsl re case will be heard in due course by a panel unless the court votes to hear it en banc. ec
Apr. 3	Filed, as of Mar. 25, ORIG & 15 COPIES AMICUS BRIEF (State of Washington) 3/22. db
May 2	Filed as of April 29, Orig & 15 copies aple's briefs (50 pgs) & 5 supplemental excerpts of record. 4/26. pw
May 8	FILED AS OF APR. 29, CERTIFICATE OF RECORD. 4/25/85. tu
May 13	FILED ORIG & 15 COPIES APLTS' REPLY BRIEF (24 pgs) 5/10. db
May 14	Sent set of briefs on appeal to Civatt, re: General Order 5.2(a). db
May 28	Rec'd as of May 20, notice of change of address from Glenn M. Feldman, Esq., counsel for Cabazon Band of Mission Indians. 5/14. db
July 20	Recvd, as of July 19, orig only of aplt (State) counsel's ltr of add'l citation & copy of opinion cited in ltr. (no service-counsel notified). jc
July 29	Recvd letter dated July 18, from Roderick E. Walston, re: decision of the federal dist. ct. for the W. Dist. of Michigan in USA vs. Dakota, et al. 7/24. gb
Aug. 6	Recvd letter dated Aug. 5, from Roderick E. Walston, re: amended additional citations. ab
Aug. 15	Received notice denying hearing en banc. jcw
Aug. 27	Filed as of 8/26, State of California and Riverside County mtn requesting taking of Judicial Notice and memorandum of points and authorities in support of. (Panel) 8/23. rmc
Aug. 30	Recvd as of 8/29, ltr dtd 8/26, from Glenn M. Feldman, Esq., counsel for aples responding to

DATE	FILINGS-PROCEEDINGS
	aples' ltr dtd 8/5/85 re: add'l citations. (Panel) 8/26. rmc
Sept. 10	Filed aples' response to aplts' mtn requesting taking of judicial notice. (panel) 8/30. rmc
Sept. 23	FILED AS OF APR. 29, CERT TRANSC OF RECORD ON APPEAL IN TWO VOLUMES, VOL. 1 CLERK'S RECORD (PLDGS); VOL. 2 RPTRS (copy). ec
Sept. 27	Filed order (SR DEP CLK, JC) the aplt's motion to take judicial notice will be considered at the time of oral argument. Counsel should be prepared to address the issue. jcw
Oct. 3	Recvd as of 10/2, ltr dtd 10/1, from George Forman, Esq., counsel for aples re: add' citations. (Panel) 10/1. rmc
Oct. 10	ARGUED & SUBMITTED TO ANDERSON, FARRIS & NELSON, CJJ. Motion to take judicial notice granted. jc
Oct. 29	Recvd as of 10/28, ltr dtd 10/24, from Barbara E. Karshmer, Esq., counsel for aple re: citation of U.S. v. Dakota, et al. (panel) 10/24 (M84-246CA2, W.D. Mich., June 28, 1985). rmc
Nov. 15	Recvd as of 11/14, ltr dtd 11/13, from Roderick E. Walston, Supervising DAG counsel for aplts re: enclosed is a copy of the order of the DC dismissing the claim for money damages of pltf Morongo Band of Mission Indians. (Panel) 11/13. rmc
1986	
Feb. 25	ORDERED OPINION (ANDERSON) FILED & JUDGMENT TO BE FILED & ENTD. vm
Feb. 25	Filed Opinion—AFFIRMED. vm
Feb. 25	Filed & Entered Judgment. vm JS34

DATE	FILINGS-PROCEEDINGS
Mar. 15	Filed as of 3/10, aple's (CABAZON BAND OF MISSION INDIANS) bill of costs. 3/5. rmc
Mar. 17	Filed The State of California, Riverside County, and Ben Cla k notice of appeal to the Supreme Ct. of the U.S. (3/17). rmc
Mar. 21	MANDATE ISSUED W/COSTS. ec
Mar. 28	Filed as of 3/24, aples' mtn to transfer attys' fees to DC. 3/20 (panel). ec
Apr. 7	Filed as of April 3, aplt's opposition to aple's motion to transfer request for attys' fees to DC. (PANEL) 4/2. gb
Apr. 14	Filed State of California, Riverside County & Ben Clark's Amended Notice of Appeal to the Supreme Court of the U.S. (original returned, copy to case file). dmd
Apr. 15	Filed as of 4/8 order (ANDERSON, FARRIS & NELSON) The motion of the aples to transfer the request for attornys' fees to the United States District Court for the Central District of California is GRANTED. vm
Apr. 15	Filed as of 4/8 AMENDED OPINION (ANDERSON, FARRIS & NELSON) (see case file) AFFIRMED. vm
Apr. 21	Recvd as of 4/14, returned as of 4/21, aples' response to aplts' opposition to mtn to transfer request for attys' fees to DC. (moot see order of 4/8) (returned per atty) 4/9. rmc
May 14	Recvd from U.S. Supreme Court notice re filing cert (Apr. 17, 1986, No. 85-1708). ec
June 20	Filed copy of SC order of 6/9/86, the statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. (Panel). jlc

3. COMPLAINTS

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THE CABAZON BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 83-1117-LEW(Tx)

THE CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK, individually and in his official capacity as Sheriff of Riverside County,

Defendants.

AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

Plaintiff Cabazon Band of Mission Indians, for its amended complaint, herein avers:

INTRODUCTION

1. This is a civil action to enjoin the enforcement of two Riverside County Ordinances—involving the playing of poker and bingo—on the Cabazon Indian Reservation; for a declaratory judgment that the County, the County Sheriff and their officers, agents, and employees are without authority to enforce these local ordinances on and within the boundaries of the Cabazon Reservation; and for damages resulting from the improper and unlawful actions of defendants in attempting to enforce the local ordinances in question on the Cabazon Indian Reservation.

THE PARTIES

2. Plaintiff Cabazon Band of Mission Indians (hereinafter "the Cabazon Band" or "the Band") is a federally recognized Indian tribe, the governing body of which is recognized by the Secretary of the Interior. Plaintiff Band has adopted Articles of Association which have been approved by the Sacramento Area Director of the Bureau of Indian Affairs, acting upon authority delegated to him by the Secretary of the Interior. Plaintiff is the beneficial owner of, and exercises sovereignty over, the Cabazon Indian Reservation (hereinafter "Reservation"), compromising approximately 1700 acres in Riverside County, California; legal title to the Cabazon Reservation is held in trust for plaintiff by the United States of America.

3. Defendant County of Riverside is a county of the State of California.

4. Defendant Ben Clark is the Sheriff of Riverside County, and is sued both in his official capacity and as an individual. As County Sheriff, defendant Clark is the highest ranking member of the Sheriff's Department and com-

mands and directs the activities of all other officers of the Riverside County Sheriff's Department.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. § 1331, in that the matter in controversy arises under the Constitution and laws of the United States; under 28 U.S.C. § 1362, in that this is an action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution and laws of the United States; under 28 U.S.C. §§ 2201-02, in that plaintiffs seek declaratory and injunctive relief; and under 28 U.S.C. § 1343, in that plaintiffs assert a civil rights cause of action under 42 U.S.C. § 1983.

6. Venue lies in this District under 28 U.S.C. § 1391 (b).

FACTUAL ALLEGATIONS

7. Since time immemorial, members of the Cabazon Band of Mission Indians and their ancestors have resided in, used, and occupied the desert areas of the Coacheila Valley in southern California. The present Cabazon Indian Reservation was originally established by Executive Order of President Ulysses S. Grant on May 15, 1876, "for the permanent use and occupancy" of the Cabazon Band. The Reservation was further expanded in 1895 and again in 1910 under the provisions of the California Mission Indians Relief Act of 1891, 26 Stat. 712 I Kappler, *Indian Affairs: Laws and Treaties*, 383-85. That Act also provided that lands so reserved would be held "for the sole use and benefit of the band . . . to which it is issued."

8. Legal title to the lands comprising the Cabazon Indian Reservation is held by the United States, in trust for the beneficial owners, the Cabazon Band of Mission Indians.

9. It is the law and policy of the United States Government to encourage and facilitate the economic development of Indian Reservations by Indian tribes and to foster and promote Indian self-determination by strengthening Indian tribal governments. These policies are set forth, *inter alia,* in § 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1451 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*, the Indian Self-Determination Act of 1975, 25 U.S.C. §§ 450 *et seq.*, the Indian Tribal Governmental Tax Status Act of 1982, P.L. 97-473, 96 Stat. 2607-11, and President Reagan's Statement on Indian Policy, January 24, 1983.

10. In furtherance of these goals and pursuant to its sovereign powers of self-government, the Cabazon Band, on May 24, 1980, lawfully enacted Tribal Ordinance No. 5.7, Regulation of Card Clubs, a copy of which is attached hereto as Plaintiff's Exhibit A.

11. Cabazon Tribal Ordinance No. 5.7 authorizes the establishment of one or more card clubs on and within the boundaries of the Cabazon Indian Reservation, to be owned and operated by the plaintiff Band.

12. The only card games authorized to be played within such tribal card clubs are the games of draw poker, lowball draw poker and panguingue.

13. The games of draw poker, lowball draw poker and panguingue are permitted under California State Law and public policy. These games are played openly and lawfully

in many areas of California, including Lake Elsinore, which, like the Cabazon Indian Reservation, lies within Riverside County.

14. In accordance with both California State Law and Cabazon Tribal Ordinance, the Cabazon Band constructed and, on or about October 16, 1980, began operating a card club on and within the boundaries of the Cabazon Indian Reservation.

15. On October 18, 1980, officers of the Indio City Police Department, alleging jurisdiction over the Cabazon card club, came onto the Cabazon Indian Reservation, arrested over 100 officers, members, employees and non-members of the Cabazon Band, and ordered the card club closed, for allegedly violating a local ordinance of the City of Indio which prohibited poker games.

16. On October 22, 1980, the Cabazon Band filed suit in the United States District Court for the Central District of California. *The Cabazon Band of Mission Indians v. The City of Indio, California, et al.*, No. CV 80-4672 LEW. That suit, which sought declaratory and injunctive relief against the City of Indio, California and the Indio City Police Chief alleged, first that the City of Indio was without jurisdiction over the Cabazon card club because the City had never lawfully annexed the portion of the Cabazon Indian Reservation on which the card club was located. Second, and more generally, the suit alleged that the City was without lawful authority to attempt to enforce local ordinances on the federally-owned Cabazon Indian Reservation.

17. On November 10, 1980, the District Court granted the Cabazon Band's motion for preliminary injunction, permitting the card club to reopen. On May 18, 1981, following

cross-motions for summary judgment, the Court entered judgment for the defendants, but on May 22, 1981, it granted the Cabazon's motion for an injunction pending appeal, allowing the card club to continue operating while an expedited appeal was taken to the Ninth Circuit Court of Appeals.

18. In an opinion filed on December 14, 1982, the Ninth Circuit Court of Appeals reversed the District Court and held that the City of Indio had no authority to enforce its local ordinances on the Cabazon Indian Reservation, inasmuch as the attempted annexation of Cabazon Reservation land by the City in 1970 had been unlawful and, therefore, void *ab initio*. *Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982). Because it found the City's actions to be unlawful under plaintiff's "annexation" argument, the court of appeals did not rule on the Cabazon Band's broader "lack of jurisdiction" argument.

19. On December 10, 1981, the Cabazon Card Club filed a voluntary petition in bankruptcy, seeking reorganization under Chapter 11 of the Federal Bankruptcy Act. *In re Cabazon Indian Casino*, No. SB 81-03397-WH (United States Bankruptcy Court, C.D. Cal.). Since that time, the Cabazon Band has continued to operate its card club as a "debtor in possession" under federal bankruptcy law.

20. On or about January 28, 1982, the former manager of the Cabazon card club filed an adversary proceeding in the Bankruptcy Court, alleging improper discharge from his managerial position and seeking substantial monetary damages therefore. Subsequently, the debtor Cabazon filed a cross-complaint against the former manager alleging that he had failed to properly account for, report or deposit all

monies under his management and control and seeking $250,000 in damages. On December 6, 1982, the Bankruptcy Court granted the Cabazon Band's motion for summary judgment and dismissed the former manager's complaint. The Cabazon Band's cross-complaint is currently pending.

21. As a "debtor in possession," the Cabazon Band must report all card club income and expenditures to the Bankruptcy Court through weekly and monthly reports to the United States Trustee. All income, except that necessary to pay current bills and fund essential tribal programs and services, is being retained in order to repay creditors under an approved repayment plan.

22. As an additional revenue generating enterprise, the Cabazon Band has duly enacted Cabazon Tribal Ordinance No. 5.6, Regulation of Bingo Games, a copy of which is attached hereto as Plaintiff's Exhibit B. Pursuant to this ordinance, the Cabazon Band is presently constructing a building on its reservation to be used as a bingo parlor. The building will be completed, and it is expected that tribally-sponsored bingo games will begin, on or about March 1, 1983.

23. On December 21, 1982, the Ninth Circuit Court of Appeals decided *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982). In that case, the court squarely held that the Sheriff of San Diego County could not enforce state and county bingo laws against tribally-sponsored bingo games on a California Indian reservation.

FIRST CLAIM FOR RELIEF

24. Plaintiff repeats and realleges the allegations of paragraphs 1-23 as if fully set forth herein.

25. On February 15, 1983, at approximately 5:30 p.m., card games of draw poker, lowball draw poker and panguingue, which are lawful under the laws of the State of California and the ordinances of the Cabazon Band, were in progress within the Cabazon card club.

26. At the time and date aforesaid, 16 officers of the Riverside County Sheriff's Department, acting under the direction and command of defendant Clark, came onto the Cabazon Indian Reservation and entered the card club. An officer announced that everyone was to remain seated and that all persons present would be cited for illegal gaming.

27. Officers of the Riverside County Sheriff's Department thereupon issued citations to Brenda James, the First Vice Chairman of the Cabazon Band, Charles Welmas, the Second Vice Chairman of the Cabazon Band, and approximately 30 other members, employees and non-members of the Cabazon Band, alleging violations of Riverside County Ordinance Number 331, a copy of which is attached hereto as Plaintiff's Exhibit C. The officers also seized and confiscated $3,000 in cash, certain files and records and a substantial amount of personal property belonging to the Cabazon Band, including all of the cards and poker chips on the premises.

28. An officer who identified himself as Detective Martin stated his intention to continue to enforce the Riverside County Ordinance, by means of arrest, as long as the Cabazon card club continued to operate. As a result, the Cabazon card club immediately ceased operation.

29. Defendants are without lawful authority or jurisdiction to enforce or attempt to enforce local ordinances of Riverside County on and within the federally-owned Caba-

zon Indian Reservation, which ordinance seeks to regulate, condition, interfere with or prohibit conduct which is permitted under the laws and public policy of the State of California and the ordinances of the Cabazon Band.

30. By enactment of Public Law 83-280, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (hereinafter "P.L. 280"), the Congress of the United States granted to five states, including California, the limited right to enforce certain civil and criminal state laws on Indian Reservations located within these states. P.L. 280, by defining the limits of the State of California's jurisdiction over the Cabazon Indian Reservation, necessarily preempts and reserves to the federal government or the Cabazon Band jurisdiction not so granted.

31. P.L. 280 is not a grant of jurisdiction authorizing county governments to enforce local ordinances on Indian reservations in California which would regulate, condition, interfere with or prohibit conduct which is lawful under California state law and public policy and which is authorized and regulated by tribal ordinance. Riverside County Ordinance Number 331 is not a "law of the State" of California within the meaning of P.L. 280, and, therefore, may not be enforced on the Cabazon Indian Reservation.

32. The Cabazon card club is the primary source of tribal revenue for the Cabazon Band. In the event that the Cabazon card club remains closed, the Cabazon Band would be unable to fund its tribal programs and services. Moreover, in the event of continued closure, the U.S. Trustee would be empowered to convert the present Chapter 11 reorganization to a "straight bankruptcy" under

Chapter 7. This would result in the forced sale of all card club equipment and property for the benefit of creditors and would make it possible for the Cabazon Band to reopen its card club enterprise in the future.

33. Defendants' unlawful and unauthorized conduct in attempting to enforce the local ordinance of the County of Riverside on the Cabazon Indian Reservation (a) has resulted in the unlawful arrest of officers, members, employees and non-members of the Cabazon Band; (b) caused the card club to shut down and cease operations, depriving plaintiff of lawful and vitally needed economic revenues; and (c) has violated the rights of the Cabazon Band to self-determination and to exercise the rights and privileges of governance over the Cabazon Indian Reservation, subject only to such Federal or State laws as may be applicable.

34. Plaintiff has no adequate remedy at law for the averred actions of defendants.

SECOND CLAIM FOR RELIEF

35. Plaintiff repeats and realleges the allegations of paragraphs 1-34 as if fully set forth herein.

36. The card games of draw poker, lowball draw poker and panguingue are played and wagered on in Lake Elsinore.

37. Lake Elsinore, like the Cabazon Indian Reservation, is located within the County of Riverside.

38. The defendants have made no effort to enforce Riverside County Ordinance No. 331 against persons engaging in, or permitting to be played, the games of draw poker, lowball draw poker and panguingue in Lake Elsinore.

39. By enforcing Riverside County Ordinance No. 331 against plaintiff, while failing to enforce the ordinance against identical conduct engaged in by others, defendants have deprived the Cabazon Band of the equal protection of the law, in violation of the Constitution of the United States.

40. Plaintiff has no adequate remedy at law for the averred actions of defendants.

THIRD CLAIM FOR RELIEF

41. Plaintiff repeats and realleges the allegations of paragraphs 1-40 as if fully set forth herein.

42. Despite the clear mandate of *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), defendant Clark has publicly stated that he will not permit tribally-sponsored bingo games to be conducted on the Cabazon Indian Reservation and that he will close down the Cabazon bingo parlor if it attempts to open.

43. Defendant Clark's threat to enforce state and county bingo laws, including Riverside County Ordinance Number 558, a copy of which is attached hereto as Plaintiff's Exhibit D, on the Cabazon Indian Reservation is unlawful and constitutes impermissible infringement of the tribal sovereignty of plaintiff Cabazon Band. Such action will deprive plaintiff of needed tribal revenues and will violate the Cabazon Band's lawful right to self-determination, self-governance and reservation economic development, as secured to it under the Constitution, laws and policies of the United States.

44. Plaintiff has no adequate remedy at law for the averred actions of defendants.

FOURTH CLAIM FOR RELIEF

45. Plaintiff repeats and realleges the allegations of paragraphs 1-44 as if fully set forth herein.

46. Under Articles 1, § 8, cl. 2 and Article II, § 2, cl. 2 of the United States Constitution, the regulation of Indian affairs is entrusted to the federal government, to the exclusion of the states.

47. The Constitution thus secures to plaintiff Cabazon Band an immunity from state law except to the extent that Congress expressly authorizes the application of state law on the Reservation.

48. The averred actions of defendants were taken without congressional authorization and have, therefore, deprived the plaintiff of rights and immunities secured to it by the Constitution of the United States.

49. Plaintiff has no adequate remedy at law for the averred actions of defendants.

FIFTH CLAIM FOR RELIEF

50. Plaintiff repeats and realleges the allegations of paragraphs 1-49 as if fully set forth herein.

51. The Cabazon Band exercises inherent sovereignty and the right of self-governance over the Cabazon Indian Reservation.

52. The inherent sovereignty of Indian tribes has been recognized by the United States government as part of the federal common law.

53. The averred actions of the defendants impermissibly infringe on the inherent tribal sovereignty of plaintiff, depriving it of rights secured to it under the federal common law.

54. Plaintiff has no adequate remedy at law for the averred actions of defendants.

SIXTH CLAIM FOR RELIEF

55. Plaintiff repeats and realleges the allegations of paragraphs 1-54 as if fully set forth herein.

56. The averred actions of defendants are unlawful in that they are preempted under P.L. 280, the California Mission Indians Relief Act of 1891, and other federal laws and policies promoting tribal self-government and reservation economic development.

57. Plaintiff has no adequate remedy at law for the averred actions of defendants.

SEVENTH CLAIM FOR RELIEF

58. Plaintiff repeats and realleges the allegations of paragraphs 1-54 as if fully set forth herein.

59. The averred acts of defendants constitute an attempt by defendants, acting under color of state law, to unlawfully expand and extend the jurisdiction of the County of Riverside over plaintiff Indian tribe, tribal trust lands and other tribal assets and property. Such acts of defendants are violative of the United States Constitution and the clear mandate of federal laws and policies regarding the inherent soverign rights of plaintiff, and constitute deprivation of rights, privileges and immunities of plaintiff secured by the United States Constitution, laws and policies, all in violation of 42 U.S.C. § 1983.

WHEREFORE plaintiff prays:

1. That the Court enter judgment declaring that Riverside County Ordinance Number 331 is of no force and effect on and within the boundaries of the Cabazon Indian Reservation;

2. That the Court enter judgment declaring that defendant Clark is without authority and jurisdiction to enforce or attempt to enforce Riverside County Ordinance Number 331 on and within the boundaries of the Cabazon Indian Reservation;

3. That the Court enter a temporary restraining order, preliminary injunction pending the entry of a final judgment, and a permanent injunction enjoining defendants County of Riverside, Clark and their successors, assigns, officers, agents, employees, attorneys, and all other persons acting or attempting to act on their behalf, or in concert with them from taking any steps to enforce or to attempt to enforce Riverside County Ordinance Number 331 on and within the boundaries of the Cabazon Indian Reservation against persons engaging in, or permitting to be played, the card games of draw poker, lowball draw poker, and panguingue;

4. That the Court enter an order directing defendants to return to plaintiff forthwith all monies, files, records, equipment and property belonging to the Cabazon Band of Mission Indians which was seized by defendants in the Cabazon card club on February 15, 1983;

5. That the Court enter judgment declaring that Riverside County Ordinance Number 558 is of no force and effect on and within the boundaries of the Cabazon Indian Reservation;

6. That the Court enter judgment declaring that defendant Clark is without authority or jurisdiction to enforce or attempt to enforce Riverside County Ordinance Number 558 on and within the boundaries of the Cabazon Indian Reservation;

7. That the Court enter a temporary restraining order, preliminary injunction pending the entry of a final judgment, and a permanent injunction enjoining defendants County of Riverside, Clark and their successors, assigns, officers, agents, employees, attorneys, and all other persons acting or attempting to act on their behalf, or in concert with them from taking any steps to enforce or to attempt to enforce Riverside County Ordinance Number 558 against persons engaging in, or permitting to be played, the game of bingo on and within the boundaries of the Cabazon Indian Reservation.

8. That the Court award plaintiffs damages in the amount of $12,500,000 or such other amount as may be proven at trial for deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States pursuant to 42 U.S.C. § 1983.

9. That plaintiff be awarded its costs and reasonable attorneys fees pursuant to 42 U.S.C. § 1988 and other applicable federal law.

10. That the Court grant such other and further relief as may be deemed just and proper.

DATED: June 30, 1983.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

By /s/ Glenn M. Feldman
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-83-1117 (LEW) (TX)

CABAZON BAND OF MISSION INDIANS,
A Federally Recognized Indian
Tribe,

Plaintiff,

v.

COUNTY OF RIVERSIDE, STATE OF
CALIFORNIA, et al.,

Defendants.

No. CV-83-3073 (LEW)

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

COUNTY OF RIVERSIDE and SHERIFF
BEN CLARK,

Defendants,

and

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

JURISDICTION AND VENUE

1. This court has jurisdiction over this action under 28 U.S.C. § 1331(a) in that plaintiff's claims arise under the Constitution and laws of the United States; 28 U.S.C. § 1343, in that plaintiff seeks redress against the deprivation under color of State law of and/or ordinance of rights, privileges or immunities secured under the Constitution and/or laws of the United States; and 28 U.S.C. § 1362, in that plaintiff is an Indian Tribe with a governing body recognized by the Secretary of the Interior, and plaintiff's claim arise under the Constitution and laws of the United States. Venue is properly in the Central District of California in that Plaintiff and defendant County are located and plaintiff's claims arise in said District.

PARTIES

2. Plaintiff Morongo Band of Mission Indians (hereinafter referred to as "the Band") is an Indian Tribe with a governing body duly recognized by the Secretary of the Interior (hereinafter referred to as "the Secretary") and recognized by the Secretary as maintaining a government-to-government relationship with the United States. The Band is the beneficial owner of the Morongo Indian Reservation (hereinafter referred to as "the Reservation"), which consists of approximately 32,000 acres of land held in trust for the Band by the United States pursuant to a series of Presidential Executive Orders, a Presidential Proclamation, a federal statute and a deed.

Trust patents to the Reservation were issued pursuant to the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, as amended by 34 Stat. 1022, on December 14, 1908 and January 23, 1911.

3. Defendant County of Riverside (hereinafter referred to as "the County") is a political subdivision of, and is organized under the laws of the State of California. The Reservation is within the exterior boundaries of the County of Riverside.

4. Defendant Ben Clark is the duly-elected Sheriff of the County of Riverside, and in that capacity is vested with the authority to enforce all laws of the State of California and the County of Riverside. Defendant Clark is sued in his official capacity.

5. The State of California has intervened as a defendant in the action and claims an interest in the subject matter of this action.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

6. The Morongo Band of Mission Indians has approximately 750 enrolled members, about 300 of whom reside on the Reservation. Many Band members are unemployed or otherwise poverty-stricken.

7. Of the Reservation's 32,254 acres, less than one square mile, consisting of a strip of land lying along the northern side of Interstate Highway 10, which passes through the Reservation, is suitable for economic development.

8. By Ordinance adopted on April 23, 1983, the Morongo Band of Mission Indians determined that the

establishment of an exclusive Tribal Bingo Enterprise would promote the health, welfare and general interests of the Band by, *inter alia*, providing a source of revenue to the Band for the provision of governmental services needed by its members, as well as a source of employment for Tribal members. The Band further determined that because the Band lacked the capital and the management expertise to build a Bingo facility, establish the Enterprise and manage it on a profitable basis, it would be necessary to retain the services of a manager for its Enterprise. The Band's ordinance prohibits the operation on the reservation of any Bingo enterprise other than the Morongo Tribal Bingo Enterprise; regulates the days and hours during which Bingo games may be conducted, the amount of prize money which may be awarded, the minimum age of participants, and restricts the use of the Band's Bingo revenues to "the support of programs to promote the health, education and general welfare" of the Band. Said ordinance has been submitted to the United States Department of Interior, Bureau of Indian Affairs for approval.

9. On April 23, 1983, the Morongo Band of Mission Indians voted to approve an agreement with Justus Enterprises under which the Band retained the services of Justus as the Band's agent for the purpose of managing the Morongo Tribe's Bingo Enterprise.

10. When this action was filed, the Morongo Tribal Bingo Enterprise was located on a parcel of Reservation land which has been allotted to a Tribal member; when the Band commenced its Bingo operation, the Band was renting the Enterprise facilities from that Tribal member.

11. On or about February 9, 1983, the Band terminated its agreement with Justus Enterprises.

12. On May 17, 1984, the Band entered into a management agreement with CBA Development Co., Inc., pursuant to which a new Bingo facility will be constructed on Tribal land, the Band will receive a seventy-five percent (75%) share of the Enterprise profits and the Band will be actively involved in the formulation and implementation of the management policies of the Enterprise. This management agreement has been submitted to the United States Department of Interior, Bureau of Indian Affairs for approval. A copy of said agreement is attached as Exhibit A hereto.

13. When the Band initiated its Tribal Bingo Enterprise, defendants County of Riverside and Sheriff Clark threatened to arrest the operators and patrons of the Enterprise, as well as to close down the Enterprise, because the Band had not secured a license from the County pursuant to Riverside County Ordinance No. 558, and because the operation of the Enterprise otherwise allegedly violated the provisions of California Penal Code § 326.5.

14. As authorized under the Morongo Tribal Bingo Ordinance, and as operated pursuant thereto, the Morongo Tribal Bingo Enterprise has increased employment among Tribal members and has generated Tribal revenue which shall be used by the Band to support programs to promote the health, education, and general welfare of the members.

15. The Morongo Tribal Bingo Enterprise does not differ substantially or materially from the Bingo enterprise of the Barona Group of the Capitan Grande Band

of Mission Indians on that Band's Reservation in San Diego County, California.

FIRST CLAIM

16. Plaintiff realleges each of the allegations set forth in Paragraphs 1 through 14 above, and by this reference incorporates each and every such allegation herein as if set forth in full.

17. Defendants have no jurisdiction to enforce or apply California Penal Code § 326.5 and Riverside County Ordinance No. 558 to the Morongo Tribal Bingo Enterprise in the absence of the consent of the United States. Such consent never has been given and thus defendants lack jurisdiction or authority to prosecute or threaten to prosecute, cite or threaten to enforce either California Penal Code § 326.5 or Riverside County Ordinance No. 558 upon the Morongo Indian Reservation or against the operators or patrons of the Morongo Tribal Bingo Enterprise.

18. An actual controversary exists beween plaintiff and defendants, in that plaintiff contends that its past and intended future conduct of Bingo games on its Reservation without securing from defendant County a license to do so, and otherwise not conforming its operation of Bingo games in every respect to the requirements of California Penal Code § 326.5 and Riverside County Ordinance No. 558 is not subject to regulation or prohibition by defendants, while defendants contend that they possess jurisdiction to regulate or prohibit the operation of the Morongo Tribal Bingo Enterprise pursuant to California Penal Code § 326.5 and Riverside County Ordinance No. 558. In addition, plaintiff contends that its operation of

its Tribal Bingo Enterprise is not contrary to the public policy of the State which allows bingo and other gambling operations, including horseracing, to occur within the state, while defendants contend that said Tribal Bingo Enterprise is against the public policy of the State.

19. Unless enjoined therefrom, defendants will interfere with or prevent operation of the Morongo Tribal Bingo Enterprise by threatening to arrest or arresting, threatening to cite or citing, and otherwise threatening, harassing and intimidating the operators of the Morongo Tribal Bingo Enterprise and the members of the public who actually or potentially would patronize said Enterprise.

WHEREFORE, plaintiff prays as hereinafter set forth.

SECOND CLAIM

20. Plaintiff realleges each of the allegations set forth in Paragraphs 1-14 above and by this reference incorporates each such allegations herein as if set forth in full.

21. Defendant's enforcement or threatened enforcement of California Penal Code § 326.5 and/or Riverside County Ordinance No. 558 has been under color of State law, and has deprived, is depriving and will deprive plaintiff in its own right and on behalf of its members, economic benefits, rights, privileges and immunities secured by the Constitution and laws of the United States.

22. Defendants' threats to enforce California Penal Code § 326.5 and Riverside County Ordinance No. 558 against the Morongo Tribal Bingo Enterprise, its opera-

tors and its patrons were and continued to be made with knowledge that the United States Court of Appeals for the Ninth Circuit has declared said laws to be inapplicable to a Tribal Bingo enterprise operating on an Indian Reservation in California, and thus said threats were made in a bad faith effort to prevent plaintiff and its members from engaging in Reservation-based commerce, to discriminate against plaintiff and its members in favor of non-Indian groups operating Bingo games under license from defendant County and to intimidate and punish plaintiff for exercising its federally-protected sovereign rights, privileges, and immunities as a federally-recognized Indian Tribe.

23. By reason of the acts alleged in Paragraphs 20 and 21 above, plaintiff has been damaged in an amount as yet unascertained, and has been forced to retain and compensate legal counsel to protect its federally-protected and adjudicated right to operate its Bingo Enterprise without harassment or intimidation by defendants.

24. Unless enjoined by this court, defendants will continue to threaten to enforce and/or actually will enforce California Penal Code § 326.5 and Riverside County Ordinance No. 558 against plaintiff Band, its Tribal Bingo Enterprise and the operators and patrons thereof, thereby depriving plaintiff and its members of federally-protected rights, privileges and immunities, for which deprivation there exists no plain speedy or adequate remedy at law.

25. An actual controversy exists between plaintiff and defendants in that plaintiff contends that enforcement of California Penal Code § 326.5 and Riverside County

Ordinance No. 558 deprives plaintiff and its members of rights, privileges and immunities secured by the Constitution and laws of the United States, and thus that Penal Code § 326.5 and Riverside County Ordinance No. 558 may not be enforced or applied against the Morongo Tribal Bingo Enterprise while defendants deny that enforcement of said statute and ordinance deprive plaintiff and its members of any federally-secured rights, privileges and immunities, and thus may be fully enforced and applied against the Morongo Tribal Bingo Enterprises.

WHEREFORE, plaintiff prays as follows:

Pursuant to its First Claim:

1. That the Court enter judgment in favor of plaintiff declaring that defendants County of Riverside, Sheriff Ben Clark, and the State of California are without jurisdiction to enforce California Penal Code § 326.5 and/or Riverside County Ordinance No. 558 against the Morongo Band of Mission Indians, the Morongo Tribal Bingo Enterprise, or the operators or patrons of said Enterprise;

2. That the court enter judgment preliminarily and permanently enjoining defendants County of Riverside, Sheriff Ben Clark, the State of California, their agents, employees and all others in concert with them or at their direction or control from enforcing or threatening to enforce California Penal Code § 326.5 and/or Riverside County Ordinance No. 558 against the Morongo Band of Mission Indians, the Morongo Tribal Bingo Enterprise or the operators or patrons of said Enterprise.

Pursuant to its Second Claim:

1. That the court enter judgment in favor plaintiff declaring that defendants' threatened and/or actual enforce-

ment of California Penal Code § 326.5 and Riverside County Ordinance No. 558 has been color of State law and has deprived and will deprive plaintiff and its members of rights, privileges and immunities secured to plaintiff and its members under the Constitution and laws of the United States;

2. That the court enter judgment in favor of plaintiff preliminarily and permanently enjoining defendants County of Riverside and Sheriff Ben Clark, the State of California, their agents, employees and all others in concert with them or at their direction or control from threatening to enforce or actually enforcing Penal Code § 326.5 and Riverside County Ordinance No. 558 against plaintiff Morongo Band of Mission Indians, the Morongo Tribal Bingo Enterprise, or the operators or patrons of said Enterprise.

3. That the court enter judgment in favor of plaintiff Morongo Band and against defendants, jointly and severally awarding said plaintiff damages according to proof, and reasonable attorneys' fees and expenses.

PURSUANT TO BOTH CLAIMS

1. That the court award plaintiff reasonable attorneys' fees, expenses and costs of suit;

2. That the court grant such other relief as may be just and appropriate.

Dated: June 18, 1984.

FRAMPTON, KARSHMER & KESSELMAN

By: /s/ Barbara E. Karshmer
Attorney for Plaintiff

4. ANSWERS

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 83-1117-LEW-Kx

THE CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

THE COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK, individually and in his official capacity as Sheriff of Riverside County,

Defendants.

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT

Defendants answer the allegations of the Amended Complaint as follows:

FIRST DEFENSE

The Amended Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 16, 17, 18, 26, 28; defen-

dants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10, 11, 12, 19, 20, 21, 32 and deny said allegations upon said basis; and defendants deny each and every allegation contained in paragraphs 14, 25, 29, 33, 34, 39, 40, 42, 43, 44, 46, 47, 48, 49, 53, 54, 56, 57 and 59. In response to paragraph 13, defendants deny that the games of draw poker, lowball draw poker and panguingue are permitted under California state law and public policy in the County of Riverside, but do admit that those games are played in some areas of California, including the City of Lake Elsinore. In response to paragraph 27, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that they seized all of the cards and poker chips on the premises, but defendants admit the other allegations of this paragraph insofar as they are consistent with the Return to the Search Warrant filed with the Superior Court of the County of Riverside. In response to paragraph 30, defendants admit that P. L. 280 granted California the right to enforce certain civil and criminal state laws on Indian reservations, but defendants deny each and every other allegation contained therein. In response to paragraphs 36, 37 and 38 defendants admit those allegations as to the City of Lake Elsinore, but defendants deny each and every other allegation contained therein. In response to paragraphs 51 and 52 defendants admit that the Band exercises limited sovereignty and right of self-governance, but defendants deny each and every other allegation contained therein.

THIRD DEFENSE

Defendants' actions or omissions were the result of an exercise of good faith, probable cause, and/or a mistake of law or fact.

FOURTH DEFENSE

Defendants are immune from any liability.

WHEREFORE, defendants pray that plaintiff take nothing herein and judgment be entered in favor of defendants and against plaintiff, and that defendants be awarded their costs of suit and defense expenses.

Dated: August 15, 1983

GERALD J. GEERLINGS, County Counsel
PETER H. LYONS, Principal Deputy
GLENN R. SALTER, Deputy

By /s/ GLENN R. SALTER
Attorneys for Defendants

GERALD J. GEERLINGS, County Counsel
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3535 Tenth Street, Suite 300
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Telephone: (714) 787-2421

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiffs,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California; BEN CLARK, in his official capacity as Sheriff of the County of Riverside,

Defendants.

ANSWER OF DEFENDANTS

Defendants answer the allegations of the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

Defendants admit the allegations contained in paragraphs 4, 5, 11 and 12; and defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 6, 7, 8 and 9, and deny said allegations upon said basis. In response to paragraph 10, defendants admit that California Penal Code § 326.5 and Riverside County Ordinance No. 558 prohibit the game of bingo except as expressly allowed, that sponsors of bingo games must obtain a county license, that the Morongo Band has not applied for or obtained a license from the County, and that the tribal bingo ordinance is contrary to the terms of state law, including local ordinance; however, except as expressly admitted, defendants deny each and every allegation contained therein. In response to paragraph 13, defendants admit that unless restrained and enjoined, defendants will attempt to enforce state law, including local ordinance, against the bingo enterprise; however, except as expressly admitted, defendants deny each and every allegation contained therein.

THIRD DEFENSE

Defendants' actions or omissions were the result of an exercise of good faith, probable cause, and/or a mistake of law or fact.

FOURTH DEFENSE

Defendants are immune from any liability.

WHEREFORE, defendants pray that plaintiff take nothing herein and judgment be entered in favor of defendants and against plaintiff, and that defendants be awarded their costs of suit and defense expense.

Dated: June 6, 1983

GERALD J. GEERLINGS, County Counsel
PETER H. LYONS, Principal Deputy
GLENN R. SALTER, Deputy County Counsel

By /s/ GLENN R. SALTER
Attorneys for Defendants

5. ANSWERS IN INTERVENTION

JOHN K. VAN DE KAMP, Attorney General
of the State of California

RUDOLF CORONA, JR.
Deputy Attorney General

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Attorneys for State of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 83-1116-LEW-Kx

THE CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK, individually and in his official capacity as Sheriff of Riverside County,

Defendants.

PROPOSED ANSWER IN INTERVENTION

The intervenor, State of California, answers the amended complaint herein as follows:

1. Intervenor admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 16, 17, 18, 26, 28; intervenor alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10, 11, 12, 19, 20, 21, 32 and denys said allegations upon said basis; and intervenor denys each and every allegation contained in paragraphs 14, 25, 29, 33, 34, 39, 40, 42, 43, 44, 46, 47, 48, 49, 53, 54, 56, 57 and 59.

2. In response to paragraph 13, intervenor denys that the games of draw poker, lowball draw poker and panguingue are permitted under California state law and public policy in the County of Riverside, but admits that those games are played in some areas of California, including the City of Lake Elsinore.

3. In response to paragraph 27, intervenor alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegation that the County of Riverside seized all of the cards and poker chips on the premises, but intervenor admits the other allegations of this paragraph insofar as they are consistent with the Return to the Search Warrant filed with the Superior Court of the County of Riverside.

4. In response to paragraph 30, intervenor admits that Public Law 280 granted it the right to enforce certain civil and criminal state laws on Indian reservations, but intervenor denys each and every other allegation contained therein.

5. In response to paragraphs 36, 37 and 38 intervenor admits those allegations as to the City of Lake Elsinore, but intervenor denys each and every other allegation contained therein.

6. In response to paragraphs 51 and 52 intervenor admits that the Band exercises limited sovereignty and right of self-governance, but intervenor denys each and every other allegation contained therein.

RELIEF

WHEREFORE, Intervenor State of California respectfully prays that this Court:

A. Deny the declaratory relief sought by the plaintiffs;

B. Deny the temporary restraining order and preliminary and permanent injunctions sought by the plaintiffs;

C. Deny all further relief sought by the plaintiffs; and

D. Grant judgment in favor of the defendant and intervenor State of California, and grant such further relief as may be proper in the premises.

DATED: October 31, 1983

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RUDOLF CORONA, JR.,
Deputy Attorney General
RUDOLF CORONA, JR.
Attorneys for State of California

RC:bah

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (TX)

CABAZON BAND OF MISSION INDIANS, A Federally Recognized Indian Tribe,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants,

AND

THE STATE OF CALIFORNIA,

Defendant-Intervencr.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants.

ANSWER OF DEFENDANTS COUNTY OF RIVERSIDE AND BEN CLARK AND DEFENDANT IN INTERVENTION STATE OF CALIFORNIA TO THE FIRST AMENDED AND SUPPLEMENTAL COMPLAINT OF MORONGO BAND OF MISSION INDIANS

(Filed January 31, 1984)

Defendants and defendant in intervention answer the allegations of the First Amended and Supplemental Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendants and defendant in intervention upon which relief can be granted.

SECOND DEFENSE

Defendants and defendant in intervention admit the allegations contained in paragraphs 3, 4, 5, 13 and 18 and defendants and defendant in intervention deny each and every allegation contained in paragraphs 17, 21, 22 and 23; and defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 6, 7, 8, 9, 10, 11, 12, 14, 15 and deny said allegations upon said basis. In response to paragraphs 19 and 24, defendants admit that unless restrained and enjoined, defendants will attempt to enforce state law, including local ordinance, against the bingo enterprise; however, except as expressly admitted, defendants deny each and every allegation contained therein. In response to paragraphs 16 and 20, defendants and defendant in intervention incorporate all of their admissions, allegations and denials asserted in this Answer.

THIRD DEFENSE

The actions or omissions of defendants and defendant in intervention were the result of an exercise of good faith, probable cause, and/or a mistake of law or fact.

FOURTH DEFENSE

Defendants and defendant in intervention are immune from any liability.

WHEREFORE, defendants and defendant in intervention pray that plaintiff take nothing herein and judgment be entered in favor of defendants and defendant in intervention and against plaintiff, and that defendants and defendant in intervention be awarded their costs of suit and defense expense.

Dated:

GERALD J. GEERLINGS, County Counsel
PETER H. LYONS, Principal Deputy
GLENN R. SALTER, Deputy County Counsel

By .....
Attorneys for Defendant

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RODERICK E. WALSTON
RUDOLF CORONA, JR.
Deputy Attorneys General

By .....
Attorneys for Defendant-Intervenor

6. DISTRICT COURT ORDER AND JUDGMENT

[The Order and Judgment of the District Court are reprinted at pages 12-18 of the Appendix attached to the Jurisdictional Statement.]

7. NINTH CIRCUIT DECISION

[The Decision of the Ninth Circuit Court of Appeals is reprinted at pages 1-11 of the Appendix attached to the Jurisdictional Statement.]

8. STIPULATION (CABAZON)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

THE CABAZON BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
and BEN CLARK
Defendants,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
Defendant,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

AGREED UPON STATEMENT OF UNCONTROVERTED FACTS AS BETWEEN PLAINTIFF CABAZON BAND OF MISSION INDIANS, DEFENDANTS AND DEFENDANT-INTERVENOR TO BE USED IN CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pursuant to the proposed schedule presented to and approved by the Court on February 13, 1984, it is hereby stipulated by and between Plaintiff Cabazon Band of Mission Indians ("Cabazon Band"). and Defendants County of Riverside, California and Ben Clark, Sheriff of Riverside County, and Defendant-Intervenor, State of California, through their respective counsel, that the following facts, while not admitted, shall be accepted as true and correct for purposes of this action only and shall be used by the parties as the basis for cross-motions for summary judgment. It is understood and agreed, however, that this Stipulation not be construed as a concession by either party of the relevancy or materiality of any of the facts contained herein and the parties expressly reserve the right to argue relevancy or materiality of any of the facts stipulated herein to be true.

1. Plaintiff Cabazon Band of Mission Indians is a federally recognized Indian Tribe, with a governing body recognized by the Secretary of the Interior. The Cabazon Band has enacted Articles of Association which have been approved by the Area Director, Bureau of Indian Affairs,

under authority delegated to him by the Secretary of the Interior. The Band is listed by the Secretary of the Interior in the Federal Register as having a government-to-government relationship with the United States. 46 Fed. Reg. pp. 35360, 35361, July 8, 1981.

2. Defendant County of Riverside is a County of the State of California. Riverside County has a population of less than 4 million persons.

3. Defendant Ben Clark is the Sheriff of Riverside County, California. He is the highest ranking member of the Sheriff's Department and commands and directs the activities of all other officers of the Riverside County Sheriff's Department.

4. Defendant-intervenor State of California is a state of the United States of America.

5. The Cabazon Indian Reservation consists of approximately 1,700 acres of land in three separate parcels located in Riverside County, California. The Reservation contains no known natural resources, such as coal, oil or timber and lies in the desert region of the Coachella Valley near the cities of Mecca, Thermal, Coachella and Indio. The Cabazon Band presently has 25 enrolled members. The Reservation was initially established by Executive Order of President Ulysses S. Grant on May 15, 1876. The Reservation was expanded by Executive Order in 1891 under the provisions of the Mission Indian Relief Act of 1891, 26 Stat. 712.

6. Legal title to the lands comprising the Cabazon Indian Reservation is held by the United States of America, in trust for the beneficial owner, the Cabazon Band of Mission Indians.

7. Under Section 6(A)(7) of its Articles of Association, the General Council of the Cabazon Band is empowered "to manage the economic affairs of the Band and to establish and operate such commercial enterprises as it may deem to be for the benefit of the Band."

8. Under Section 6(A)(10) of its Articles of Association, the General Council of the Cabazon Band is empowered "to take such actions as are necessary by the enactment of codes, ordinances and resolutions or by any other means to carry into effect any of the enumerated or reserved powers of the Band."

9. Pursuant to the tribal powers referred to in paragraphs 7 and 8, above, the Cabazon General Council on May 24, 1980, duly enacted Cabazon Tribal Ordinance No. 5.7, Regulation of Card Clubs. A copy of said Ordinance is attached hereto as Exhibit A.

10. Cabazon Tribal Ordinance No. 5.7 authorizes the establishment of one or more card clubs on and within the boundaries of the Cabazon Indian Reservation, to be owned and operated by the Cabazon Band.

11. The only card games authorized to be played within such tribal card clubs under the Ordinance are the games of draw poker, lowball draw poker, and panguingue.

12. The playing of and wagering on the card games of draw poker, lowball draw poker, and panguingue are not prohibited under California Penal Code §§ 330-331.

13. Riverside County has duly enacted County Ordinance No. 331, which prohibits the playing of and wagering on the card games of draw poker, lowball draw poker and panguingue.

14. The City of Lake Elsinore, which is an incorporated city within Riverside County, has enacted a municipal ordinance permitting the playing of and wagering on the card games of draw poker, lowball draw poker and panguingue. These card games are played and wagered on at a privately owned card club within the City of Lake Elsinore.

15. Neither Riverside County nor the State of California has attempted to enforce Riverside County Ordinance No. 331 against the card games played and wagered on within the City of Lake Elsinore.

16. In conformity with Cabazon Tribal Ordinance No. 5.6, the Cabazon Band constructed and, on or about October 16, 1980, began operating a card club on and within the boundaries of the Cabazon Indian Reservation. The Cabazon Band has no management agreement for the operation of its card room and pays no percentage fee to any outside entity.

17. On February 15, 1983, Riverside County officials closed down card games of draw poker, lowball poker, and panguingue, which were being played on the reservation in accordance with Tribal Ordinance No. 5.7. The Riverside County authorities further announced their intention to continue to enforce the Riverside County Ordinance against the tribal card games.

18. Pursuant to the tribal powers referred to in paragraphs 7 and 8 above, the Cabazon General Council, on February 9, 1980, duly enacted Cabazon Tribal Ordinance No. 5.6, Regulation of Bingo Games. That Tribal Ordinance has subsequently been amended, and the current version of said Ordinance is attached hereto as Exhibit B.

19. The tribal bingo ordinance has not been submitted to or approved by the Secretary of the Interior or any other federal agency. The defendants do not allege at this time, however, that the ordinance must be submitted or approved to be effective as a valid tribal ordinance.

20. Cabazon Tribal Ordinance No. 5.6 authorizes and regulates the playing of bingo on the Cabazon Indian Reservation, "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues by the Cabazon Band of Mission Indians."

21. Cabazon Tribal Ordinance No. 5.6 further provides, in Section 4, that "Such net revenues shall be used for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes."

22. In conformity with Tribal Ordinance No. 5.6, the Cabazon Band has constructed and is now operating a tribal bingo parlor on its reservation. To facilitate its operation of this enterprise, the Cabazon Band has entered into a management agreement with a non-Indian corporation to provide financial, management, and related services. A copy of that agreement is attached hereto as Exhibit C.

23. Both the State of California, through California Penal Code section 326.5, and Riverside County, through Riverside County Ordinance No. 558, have duly enacted statutes relating to the playing of bingo.

24. Bingo games authorized under Cabazon Tribal Ordinance No. 5.6 and played in the Cabazon tribal bingo parlor do not comply in all respects with California Penal

Code section 326.5 and Riverside County Ordinance No. 558, in that, among other things, the Cabazon Band is not among the enumerated entities authorized to operate bingo games, and that prizes awarded sometimes exceed $250.

25. The Cabazon bingo parlor is approxiamtely 9,000 square feet and can accommodate approximately 500 players. The Cabazon card room is approximately 6,000 square feet in size and contains 25 card tables, which can accommodate 200 players.

26. The Cabazon bingo parlor is open to the public, as required by Cabazon Tribal Ordinance and the games include non-Indians. In addition, California Penal Code section 326.5 requires that "all bingo games shall be open to the public, not just to the members of the authorized organization." Participants are required to pay cash.

27. The bingo games offered by the Cabazon Band are conducted every day of the week.

28. The Cabazon bingo parlor is advertised through local printed media as well as through local radio programs. In addition, the Cabazon Band has erected a billboard which advertises their games as "Big Money Bingo."

29. The Cabazon Band distributes leaflets locally which advertise bingo prizes some of which exceed $250. Copies of those leaflets are attached hereto as Exhibit "D".

30. Neither California Penal Code § 326.5 nor Riverside County Ordinance No. 558 regulate or prohibit the advertising of bingo games.

31. The Cabazon Band's card club and bingo parlor provide employment for some tribal members.

32. The revenues and tribal taxes derived from the Cabazon card club and Cabazon bingo parlor fund tribal programs and services on the Reservation.

33. The defendants do not allege that the Cabazon card club or the Cabazon bingo parlor are associated with organized crime.

34. In a meeting between tribal and county representatives on February 22, 1983, the county officials stated that they intended to close down the Cabazon bingo parlor, just as they had earlier closed down the Cabazon card club.

35. The present action was commenced by the Cabazon Band of Mission Indians on February 23, 1983. A temporary restraining order against defendants was issued by the Court on February 24, 1983 and a preliminary injunction against defendants was issued by the Court on May 6, 1983.

DATED: June 19, 1984.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

Attorneys for Plaintiff
CABAZON BAND OF
MISSION INDIANS

By /s/ Glenn M. Feldman

GERALD J. GEERLINGS,
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Attorneys for
COUNTY OF RIVERSIDE

By /s/ Glenn R. Salter
Deputy County Counsel

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

Attorneys for the
State of California

By /s/ Rudolf Corona, Jr.
Deputy Attorney General

EXHIBIT A

CABAZON BAND OF MISSION INDIANS

83-203 Indio Boulevard #2
Indio, California 92201

TRIBAL ORDINANCE NO. 5.7:

REGULATION OF CARD CLUBS

Section 1.0: Authorization

CARD CLUBS are hereby authorized on and within the boundaries of the Cabazon Indian Reservation, provided that the card games played are in conformity with Cabazon Tribal Ordinances. A "CARD CLUB" shall mean a business establishment at which card games authorized under this ordinance shall be played.

Section 2.0: Ownership and Operation

Card Clubs authorized under this ordinance shall be owned and operated by the Cabazon Band of Mission Indians.

Section 3.0: Card "Games"

Card "games" shall mean draw poker and panguingue.

Section 4.0: Rules and Regulations

(a) Established: The following rules and regulations are hereby established and promulgated by the Cabazon General Council with references to card games authorized under the provision of this ordinance.

Rule 1:

(a) It shall be unlawful to permit any person to play in any game authorized by the provisions of this ordinance at any time while such person appears to be, or is, under the influence of intoxicating liquor or drug and no person

under, or who appears to be under, the influence of intoxicating liquor or drug shall play in any such game.

Rule 2:

Except in a duly authorized tournament, it shall be unlawful to permit any person playing in any games authorized by this ordinance to make any individual bet or wager in excess of the maximum bets set forth for the particular game as specified in the rules or at any time during any game to permit an ante in excess of twice the dollar limit as specified for the particular game of poker set forth in these rules as the total sum anted by players participating in the game. "Razz games," i.e., where the winner of the pot leaves in an amount for the next game, are prohibited, except in a duly authorized tournament.

Rule 3:

Each and all of the games conducted or operated on the Reservation pursuant to the provisions of this ordinance shall be conducted and operated in full conformity with, and subject to all the provisions of applicable laws.

Rule 4:

It shall be unlawful to permit or allow any person under the age of twenty-one (21) years to play any card game authorized hereunder.

Rule 5:

A) Except in a duly authorized tournament, it shall be unlawful to charge any person playing draw poker a sum less than that set forth in the following schedule, as and for seat rental, entitling such person to play in such game:

DRAW

Limit	*Maximum Bet*	*Rental*
1.00	$ 2.00	$ 1.00 per one-half hour per player
2.00	$ 4.00	$ 1.25 per one-half hour per player
3.00	$ 6.00	$ 1.75 per one-half hour per player
4.00	$ 8.00	$ 2.25 per one-half hour per player
5.00	$ 10.00	$ 2.50 per one-half hour per player
6.00	$ 12.00	$ 2.75 per one-half hour per player
8.00	$ 16.00	$ 3.00 per one-half hour per player
10.00	$ 20.00	$ 3.00 per one-half hour per player
20.00	Straight	$ 5.00 per one-half hour per player
20.00	$ 40.00	$ 5.00 per one-half hour per player
30.00	$ 60.00	$ 6.00 per one-half hour per player
40.00	$ 80.00	$ 7.00 per one-half hour per player
50.00	$100.00	$ 8.00 per one-half hour per player
60.00	$120.00	$ 8.00 per one-half hour per player
70.00	$140.00	$ 8.00 per one-half hour per player
80.00	$160.00	$ 8.00 per one-half hour per player
90.00	$180.00	$ 8.00 per one-half hour per player
100.00	$200.00	$10.00 per one-half hour per player

LOW BALL—OPEN BLIND

Limit	*Maximum Bet*	*Rental*
1.00	$ 2.00	$ 1.25 per one-half hour per player
2.00	$ 4.00	$ 1.75 per one-half hour per player
3.00	$ 6.00	$ 2.50 per one-half hour per player
4.00	$ 8.00	$ 3.00 per one-half hour per player
5.00	$ 10.00	$ 3.00 per one-half hour per player
6.00	$ 12.00	$ 3.25 per one-half hour per player
8.00	$ 16.00	$ 3.50 per one-half hour per player
10.00	$ 20.00	$ 3.50 per one-half hour per player
10.00	Raise blind $ 20.00	$ 4.00 per one-half hour per player
15.00	$ 20.00	$ 4.00 per one-half hour per player
15.00	Raise blind $ 20.00	$ 5.00 per one-half hour per player
20.00	$ 20.00	$ 5.00 per one-half hour per player
20.00	Raise blind $ 20.00	$ 6.00 per one-half hour per player
20.00	$ 40.00	$ 6.00 per one-half hour per player
30.00	$ 60.00	$ 7.00 per one-half hour per player
40.00	$ 80.00	$ 8.00 per one-half hour per player
50.00	$100.00	$ 8.00 per one-half hour per player
60.00	$120.00	$ 8.00 per one-half hour per player
70.00	$140.00	$ 8.00 per one-half hour per player
80.00	$160.00	$ 8.00 per one-half hour per player
90.00	$180.00	$ 8.00 per one-half hour per player
100.00	$200.00	$10.00 per one-half hour per player

Except in a duly authorized tournament, it shall be unlawful to charge for the playing of the game of panguingue a sum less than the minimum table rental per person, and such minimum rates shall be according to the following schedule:

$ .50 condition games	$1.00 per one-half hour per player
$ 1.00 condition games	$1.25 per one-half hour per player
$ 2.00 condition games	$2.00 per one-half hour per player
$ 3.00 condition games	$2.75 per one-half hour per player
$ 4.00 condition games	$3.50 per one-half hour per player
$ 5.00 condition games	$4.00 per one-half hour per player
$10.00 condition games	$6.00 per one-half hour per player
$15.00 condition games	$7.00 per one-half hour per player
$20.00 condition games	$8.00 per one-half hour per player
$20.00 and above	$8.00 per one-half hour per player

Rule 6:

The only games permitted to be played in a card club authorized by the provisions of this ordinance shall be the game of draw poker, and the game of panguingue.

Rule 7:

The playing of all games provided for in this ordinance shall be confined to the area designated as "Card Room", which shall be located on the first floor, or ground floor, of a card club, and no playing of any game provided for or permitted by this ordinance shall be permitted at any other location of such premises.

Rule 8:

A card club shall be open for inspection during all hours to the Tribal Chairman, or a duly authorized Gaming Commission, without a search warrant.

Rule 9:

Notwithstanding the foregoing rules, poker tournaments shall be permitted, provided that the time, place

and special rules including the minimum and maximum bets for such tournament play, are first approved by the Cabazon Band Business Committee.

Section 5.0: Registration, Fingerprinting, and Photographing of Certain Employees of Card Clubs

(a) It shall be unlawful for any card club on the Reservation to employ any person without such person having been first fingerprinted and photographed by the law enforcement agency of the Reservation.

(b) As set forth in subsection (a) of this section, any person employed by a card club on the Reservation, within three (3) days after such employment shall submit to fingerprinting and photographing by the Reservation law enforcement agency. A processing fee in an amount set by the Cabazon Business Committee, shall be paid to the law enforcement officer to cover the costs of such fingerprinting and photographing.

(c) It shall be the responsibility and duty of the Reservation law enforcement officer to establish the necessary procedures to implement and administer the provisions of this section.

(d) The information received by the law enforcement officer pursuant to the provisions of this section shall be treated as confidential and shall be accessible only to the Tribal Chief of Police and the Tribal Chairman as well as such other persons or agencies that they shall determine should be informed.

Section 6.0: Unlawful Act

(a) Unlawful Locations: It shall be unlawful for any person to play, or permit the playing of, any game regu-

lated or referred to by the provisions of this ordinance at any place within the Reservation, except a card club operated pursuant to the provisions of this ordinance.

(b) Unlawful Games: It shall be unlawful for any person to play any game at any place pursuant to this ordinance, which game is not permitted by the provisions of this chapter, or in any game played in violation of this ordinance.

(c) Draw Poker Variation: It shall be unlawful for any person to play, or allow or permit to be played, at any place of business authorized under the provisions of this ordinance any variation of the game of draw poker wherein five (5) cards are not originally dealt to each player, or wherein each player shall draw any greater or lesser number of cards than the number of cards originally discarded prior to the draw, or in any game played in violation of any provision of this ordinance.

Section 8: Presumptions

The Cabazon General Council, in adopting the provisions of this ordinance and establishing the regulation of card clubs owned and operated by the Cabazon Band of Mission Indians to permit the playing of the game of draw poker, and the game of panguingue, hereby declares that the playing of games not prohibited by statute is conducive to public morals when the same are played and conducted according to all the laws, rules, regulations, and provisions as set forth in this ordinance, and that in any proceedings to challenge the validity of this ordinance, or to abate the business conducted hereunder, or to prosecute the Cabazon Band, its officers, members, employees or agents for any acts authorized thereby, it shall be presumed that

such acts are not unlawful and that such business is not a public or private nuisance.

Section 9: Violations

It shall be unlawful for any person to violate any of the provisions of this ordinance.

Section 10: Date of Effect of Ordinance

This ordinance shall take effect immediately upon its adoption.

Section 11: Validity of Ordinance

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of the Cabazon Tribal Court or other court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The Cabazon General Council hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more section, subsection, phrases or portion be declared invalid or unconstitutional.

Section 12: Certification

The Business Committee shall certify the adoption of this ordinance and shall cause the same to be published in the manner prescribed by law.

CERTIFICATION

This is to certify that the above ordinance was adopted at a General Council meeting held on 24th day of May, 1980 by a vote of 14 for, 2 against, 1 abstaining.

/s/ Illegible
Chairman

/s/ Illegible
Vice-Chairman

/s/ John A James
Secretary-Treasurer

EXHIBIT B

83-203 Indio Avenue, # 9
Indio, CA 92201

WHEREAS: We are approving said Bingo Ordinance

TRIBAL ORDINANCE NO. 5.6: REGULATION OF BINGO GAMES

Section 1:

As used in this ordinance, "bingo" means (a) a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random; or (b) the use of cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes; the winning cards shall not be known prior to the game by any person participating in the playing or the operation of the game; and all such preprinted cards shall bear the legend "Cabazon Indian Reservation."

Section 2:

In order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues, by the Cabazon Band of Mission Indians. Bingo games are hereby authorized on and within the boundaries of the Cabazon Indian Reservation, provided that such games are in conformity with laws of the Cabazon Band of Mission Indians and this ordinance.

Section 3:

All bingo games authorized by this ordinance shall be sponsored by the Cabazon Indian Reservation. No other person, group, corporation, individual, Indian Tribe or

Band, or entity is or shall be authorized to sponsor a bingo game on or within the boundaries of the Cabazon Indian Reservation.

Section 4:

All net revenues derived from a bingo game shall be kept in a special fund or account and shall not be comingled with any other fund or account. Such net revenues shall be used for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes.

Section 5:

Bingo games shall be open to the public.

Section 6:

No person under eighteen years of age shall be allowed to participate in any bingo game.

CERTIFICATION

We, the undersigned duly elected members of the Cabazon Band of Mission Indians, do hereby certify the foregoing Ordinance was adopted by the Cabazon General Council by a vote of 9 for, 5 against, 1 abstaining.

/s/ Arthur Welmas
Tribal Chairman

/s/ Brenda James
1st Vice-Chairman

/s/ Charles Dean Welmas
2nd Vice-Chairman

/s/ John A. James
Secretary-Treasurer

9. STIPULATION (MORONGO)

BARBARA E. KARSHMER
Attorney at Law
FRAMPTON, KARSHMER & KESSELMAN
925 N Street, Suite 150
Fresno, California 93721
(209) 233-1195

Attorneys for Plaintiff, MORONGO BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV-83-1117-LEW(Tx)

THE CABAZON BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK,

Defendants.

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

CASE NO CV-83-3073 (LEW)

MORONGO BAND OF MISSION, INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, et al.,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

AGREED STATEMENT OF UNCONTROVERTED FACTS

The Plaintiff, Morongo Band of Mission Indians, and Defendants County of Riverside and Ben Clark, and Defendant-in-Intervention, State of California, acting through their respective counsel, agree and stipulate that the following facts, while not admitted, shall be accepted as true and correct for the purpose of this action only and shall be used as the basis for cross motions for summary judgment scheduled to be filed herein on June 29, 1984. It is understood and agreed, however, that this stipulation shall not be construed as a concession by either party of the relevancy or materiality of any facts contained herein and that the parties expressly reserve the right to argue relevancy or materiality of any facts stipulated herein to be true.

1. The Morongo Band of Mission Indians (hereinafter "Morongo Band") is a federally-recognized Indian Tribe having a governing body duly recognized by the Secretary of the Interior. The Morongo Band is listed by the Secretary of the Interior in the Federal Register as having a government-to-government relationship with the United States. 46 Fed. Reg. pp. 35360, 35361, July 8, 1981.

2. The Morongo Band of Mission Indians is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land in Riverside County, California. The Morongo Indian Reservation is located east of the City of Banning in the San Gorgonio Pass.

3. The Reservation originally was created by, *inter alia*, a series of Presidential Executive Orders, see, *e.g.*,

1 Kappler, *Indian Laws and Treaties* 821, Order of August 25, 1877, Presidential proclamations, a federal statute and deeds, beginning in 1876 and ending in 1948. Trust patents were issued on December 14, 1908 and January 23, 1911 pursuant to the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, as amended by the Act of March 1, 1907, 34 Stat. 1022. Under those patents, title to the Reservation is held by the United States "in trust for the sole use and benefit of the said Morongo Band or Village of Indians . . ."

4. Defendant County of Riverside (hereinafter referred to as "the County") is a political subdivision of, and is organized under the laws of, the State of California. The Morongo Indian Reservation is within the exterior boundaries of the County of Riverside.

5. Defendant Ben Clark is the duly-elected Sheriff of the County of Riverside, and in that capacity is vested with the authority to enforce all laws of the State of California and the County of Riverside.

6. The State of California has intervened as a defendant in this action.

7. The Morongo Band of Mission Indians has about 730 enrolled members, approximately 300 of whom reside on the Morongo Indian Reservation.

8. The unemployment level on the Morongo Indian Reservation is in excess of sixty-four percent (64%).

9. The Morongo Indian Reservation is located in a high desert, mountain pass area and has no known natural resources such as timber, wild life or fish, oil, or coal to

utilize to create revenue for the operation of its government or the provision of services to its members.

10. By Ordinance adopted on April 23, 1983, the Morongo Band of Mission Indians authorized the playing of Bingo on the Morongo Indian Reservation. See Exhibit 1. Through its ordinance it determined that the establishment of a Tribal Bingo Enterprise would promote the health, welfare, and general interests of the Band by, *inter alia*, providing a source of revenue to the Band for the provision of governmental services needed by its members, a source of employment for Tribal members, and a source of funding for programs to promote the health, education, and welfare of its members. The Band further determined that, because the Band lacked the capital and the management expertise to build a Bingo facility, establish the enterprise and manage it on a profitable basis, it would be necessary to retain the services of a manager for its Enterprise. The Band's Ordinance prohibits the operation of any Bingo Enterprise on the Morongo Indian Reservation other than the Morongo Tribal Bingo Enterprise, and regulates in detail the days and hours during which the Bingo games may be conducted, the amount of prize money which may be awarded, the minimum age of participants, and restricts the use of the Band's Bingo revenues to "the support of programs to promote the health, education and general welfare" of the Band. Said Ordinance has been submitted to the U.S. Department of Interior, Bureau of Indian Affairs with a request that it be reviewed and approved. At this time, however, defendants do not allege that the ordinance must be submitted to or approved by the U.S. Department of Interior, Bureau of Indian Affairs to be effective as a valid tribal ordinance.

11. On April 26, 1983, the Morongo Band of Mission Indians entered into an agreement with Justus Enterprises under which the Band retained the services of Justus Enterprises as the the Band's agent for the purpose of managing the Morongo Tribal Bingo Enterprise, and commenced operations of said Enterprise soon thereafter.

12. At all times relevant hereto, the Morongo Tribal Bingo Enterprise has been operated pursuant to the tribal bingo ordinance adopted in a referendum among the Band's members. During its operations, the Morongo Tribal Bingo Enterprise awarded prizes which at some times exceeded $250 in cash. While the Morongo Band has temporarily ceased its Tribal Bingo operations, its Bingo Ordinance remains in effect and the Morongo Band intends to begin its Tribal Bingo Enterprise again as soon as its new facility being constructed on tribal land is completed and ready for operation.

13. While the Morongo Tribal Bingo Enterprise was in operation, it employed 86 Indians.

14. When the Band initiated its Tribal Bingo Enterprise, defendants County of Riverside and Sheriff Ben Clark advised the Band that they would arrest the operators and patrons of the Enterprise, as well as to close down the Enterprise, because the Band had not secured a license from the County pursuant to Riverside County Ordinance No. 558, and because they claimed that the operation of the Enterprise violated the provisions of California Penal Code § 326.5.

15. The Bingo operation of the Morongo Tribe did not and will not comply in all respects with California Penal Code Section 326.5 and County Ordinance No. 558

in that, among other things, the Morongo Band is not among the enumerated entities authorized to operate Bingo games under that section and in that the prizes awarded did at some times exceed $250.

16. When previously in operation, the Morongo Tribal Bingo Enterprise was conducted in a facility which was approximately 28,000 square feet with a seating capacity of 1,400. This facility was on an allotted parcel of Reservation land adjacent to Interstate 10 which runs in an East-West direction through the center of the reservation. The "Indian Bingo" sign on that parcel of land was visible from Interstate 10. The tribal land on which the new tribal bingo facility is being constructed lies several miles east of this previous location. Neither Penal Code Section 326.5 nor County Ordinance No. 558 regulate or prohibit the advertising of Bingo.

17. The Morongo Tribal Bingo Enterprise was and shall be open to the public, including non-Indians, pursuant to tribal ordinance. California Penal Code § 326.5 also requires that all Bingo games shall be open to the general public, not just to the members of the organization sponsoring the games.

18. Persons 18 years of age or older are allowed to play Bingo under the Morongo tribal ordinance.

19. Riverside County Ordinance No. 558 regulates Bingo games operated in unincorporated areas of Riverside County by entities eligible to do so pursuant to California Penal Code § 326.5.

20. The State of California permits units of local government to determine whether certain other forms of

gambling, such as low-ball and draw poker, may be played in profit-making businesses maintained for that express purpose and operated by salaried employees. The State imposes no limits upon the amount which can be wagered, won, or lost in any such games.

21. The County of Riverside prohibits card rooms in unincorporated areas of the County; however, at least one city within the County of Riverside permits such gambling activities.

22. The Defendants do not allege that the Morongo Tribal Bingo Enterprise was or is associated with organized crime.

23. In January 1984, the Morongo Band of Mission Indians voted to terminate the Agreement under which Justus Enterprises had managed the Band's Bingo Enterprise, and suspended operation of the Enterprise on or about February 9, 1984 until a new manager could be employed.

24. On May 17, 1984, the Band entered into a management agreement with CBA Development Co., Inc. pursuant to which a new Bingo facility will be constructed on Tribal land, the Band will receive not less than seventy-five (75%) percent share of the Enterprise profits and the Band will be actively involved in the formulation and implementation of all the management policies of the Enterprise. Said agreement has been submitted to the United States Department of Interior, Bureau of Indian Affairs with a request that it be approved. A copy of this agreement is attached hereto as Exhibit 2.

25. The Morongo Tribal Bingo Enterprise shall be located on a parcel of Reservation land held in trust by the United States for the Morongo Band as a whole.

26. When the Morongo Tribal Bingo Enterprise commences operations again, the jackpots will at some times exceed $250.

Dated:

FRAMPTON, KARSHMER & KESSELMAN
Attorney for MORONGO BAND OF
MISSION INDIANS

By _____
BARBARA E. KARSHMER

Dated:

GERALD J. GEERLINGS, County
Counsel, Attorneys for COUNTY OF
RIVERSIDE

By _____
GLENN R. SALTER

Dated:

JOHN K. VAN DE KAMP, Attorney
General, Attorneys for STATE OF
CALIFORNIA

By _____
RUDOLPH CORONA

EXHIBIT 1

MORONGO BAND OF MISSION INDIANS
11581 Potrero Road
Banning, CA 92260

An Ordinance Regulating the Play
of the Game of Bingo on the Morongo Indian Reservation

BE IT ENACTED BY THE MORONGO BAND OF MISSION INDIANS AS FOLLOWS:

Section 1 — Definitions

The following terms and phrases when used in this Ordinance, shall have the following meanings ascribed to them, except where the context clearly indicates a different meaning:

(a) *Bingo* or quest game mean and refer to the activity commonly known as bingo and all other similarly organized and played games wherein participants pay a sum of money for the use or benefit of one or more prenumbered cards. When the game commences, numbers are drawn by chance, one by one, and announced, and the numbers are continually ascertained at random, until a participant announces that he has matched up on his prenumbered purchased card enough randomly drawn numbers to complete the desired winning pattern of numbers. At this time the participant calls out "bingo" or such other desired word or phrase and is declared the winner of a predetermined prize.

(b) *Bingo cards* shall mean and refer to the flat, usually rectangular piece of paper or thin pasteboard normally employed by players engaged in the game of bingo. More than one set of bingo numbers may be printed on any single piece of paper.

(c) *Band* or *Morongo Band of Mission Indians* shall mean the semi-sovereign federally-recognized Indian tribe which, along with certain of its members, is the beneficial owner of and the local government for the allotted and unallotted trust lands of the Morongo Indian Reservation, located to the east of the City of Banning, County of Riverside, State of California. The Band acts through its duly-serving Tribal Council or Business Committee according to the custom and tradition of our people.

(d) *Reservation* or *Morongo Indian Reservation* shall mean all those parcels of land, both allotted and unallotted and whether or not held in trust by the United States for the Band itself or any individual Indian, which are described and included in the patent issued on December 14, 1908 by the United States to the Band for the said lands, plus any additional such lands later added to the Reservation by the United States.

(e) *Player* shall mean any person paying some amount of U.S. currency for admission to, or participation in, a bingo game and who has some reasonable expectation of receiving a prize if one or more of his prenumbered cards contains a sufficient amount of numbers which are the same as those announced during a bingo game.

(f) *Prizes* shall mean and refer to any U.S. currency, cash or other property or thing of value awarded to a player of a bingo game or players in one or a series of bingo games.

Section 2 — Findings

The Morongo Band of Mission Indians makes the following findings and bases this Ordinance thereon:

(a) The Morongo Band of Mission Indians is a semi-sovereign federally-recognized Indian tribe with the duty and authority to regulate the activities of its members and others on the Reservation in the interest of the Band and its members to the maximum extent permitted by federal law.

(b) There is a great unmet need for economic development to stimulate the Reservation's economy, and a bingo operation will help to meet that need by providing employment for Band members, by attracting other business ventures, by encouraging Band members to make commercial use of their allotted trust lands, and by providing funds for the Band to use for general Band purposes.

(c) Due to present economic conditions, unemployment among Band members, which has always been above 50%, has reached an unacceptable level, causing severe economic hardship to many members of the Band, and must be addressed by the Band now, partially through this Ordinance.

(d) The Band now lacks the financial resources to provide adequate services for the health, welfare, and general benefit of its people, and will use the revenue from the bingo enterprise license granted under this Ordinance as a source of such funds, as noted below.

(e) According to its custom and tradition, the Band generally does not regulate the uses to which any member of the Band may devote his own allotted trust land. However, the Band anticipates that more than one member, and possibly the Band itself, may wish to operate bingo enterprises on the Reservation, and that such a pro-

liferation of bingo enterprises on the Reservation is not in the best interests of the Band. For this reason, the number of such bingo enterprises, and certain aspects of their operation, must be regulated for the health, welfare, and general interest of the Band and its members.

(f) By this Ordinance the Band intends to preempt and to fully occupy the field of the regulation of bingo on the Reservation, as to all those who conduct such bingo games and all those who play such bingo games, Indian and non-Indian alike.

Section 3 — Morongo Tribal Bingo Enterprise

(a) A Morongo Tribal Bingo Enterprise is hereby authorized and established as part of and for the benefit of the Morongo Band of Mission Indians.

(b) The Morongo Tribal Council is authorized and empowered to obtain suitable facilities, including parking facilities, within the exterior boundaries of the Morongo Indian Reservation, to operate and maintain the Morongo Tribal Bingo Enterprise for this purpose to enter into binding leasehold agreements or other appropriate arrangements for buildings and property located within the boundaries of the Reservation.

(c) In order to obtain persons with the necessary business and management knowledge and experience to operate the Morongo Tribal Bingo Enterprise, the Morongo Tribal Council is authorized to enter into management agreement for the maintenance, operation and management of the Tribal Bingo Enterprise on such terms and under such conditions as the Tribal Council shall determine to be fair and reasonable and in the best interests

of the Morongo Band of Mission Indians; provided that the Tribal Council shall not agree to pay any management fee which is not in its judgment necessary under prevailing market conditions to obtain competent and skilled management and business assistance for the operation of the Morongo Tribal Bingo Enterprise.

(d) Bingo games may be conducted each and every day of the week and at any hour of the day or night. Games shall be operated by the Morongo Tribal Bingo Enterprise not less than three days (Friday, Saturday and Sunday) per week. There shall be no limit as to prize money for any single game or session.

(e) No person under eighteen (18) years of age shall be allowed to play bingo.

(f) All persons operating or assisting the operation or conduct of any bingo game shall wear tags evidencing their names, or other means of identifying such persons as employees of the bingo operator.

Section 4 — Use of Net Proceeds

The Band will use all of the revenues which it collects pursuant to this Ordinance for the support of programs to promote the health, education and general welfare of its people.

Section 5 — Prohibition and Penalties

(a) No person shall conduct, operate, maintain or participate in any bingo game within the boundaries of the Morongo Indian Reservation unless such bingo game is operated or conducted by the Morongo Tribal Bingo Enterprise in accordance with this Ordinance. The Tribal

Council may waive this section in the case of bona fide charitable churches or other similar nonprofit reservation-based organizations who apply for exemption, provided however that such organizations do not offer prizes in excess of those allowed by California Penal Code § 326.5.

(b) Any person determined by the Band, acting through its Tribal Council, to be in violation of this Ordinance may be fined up to $500.00 for each violation.

EXHIBIT 2

MORONGO BAND OF MISSION INDIANS TRIBAL BINGO ENTERPRISE MANAGEMENT AGREEMENT

This Agreement is entered into on May 17, 1984, by and between the Morongo Band of Mission Indians (hereinafter referred to as the MORONGO BAND) and CBA DEVELOPMENT CO., INC. (hereinafter referred to as the MANAGER or CBA) a California corporation having Dong Choi as its principal shareholder and having its principal place of business at 4536 Wilshire Blvd., Suite 103, Los Angeles, California 90010. The purpose of this Agreement is to enter into a Management Agreement for the establishment and operation of a Tribal Bingo Enterprise on the Morongo Indian Reservation in Riverside County, California.

RECITALS

WHEREAS the Morongo Band of Mission Indians is a federally-recognized Indian tribe possessing sovereign powers over the Morongo Indian Reservation located in Riverside County, California; and

WHEREAS the Morongo Band of Mission Indians is desirous of developing economic enterprises on its reservation in order to improve the economic circumstances of its members and to enable it to better serve the social, economic, educational, and health needs of its members and to enhance tribal economic self-sufficiency and self-determination; and

WHEREAS the operation of a Tribal Bingo Enterprise will provide employment and training for many

MORONGO BAND members which is of great importance to the Band because the unemployment rate on the Morongo Indian Reservation is in excess of 60 percent; and

WHEREAS the operation of a Tribal Bingo Enterprise will provide significant financial resources to the MORONGO BAND without the necessity of any capital outlay by the MORONGO BAND; and

WHEREAS the MORONGO BAND has determined that a portion of the Reservation should be utilized for the establishment of a Tribal Bingo Enterprise; and

WHEREAS the MORONGO BAND presently lacks the resources and expertise necessary to establish and operate a Tribal Bingo Enterprise in an efficient and profitable manner, and thus, is desirous of entering into an agreement by which it may obtain the finances and management expertise necessary to establish and operate the Tribal Bingo Enterprise for a short term, but one which is sufficient to enable the MORONGO BAND to accumulate sufficient capital and expertise to assume full managerial control of said Enterprise at the expiration of this Agreement; and

WHEREAS CBA, acting as the MANAGER, can supply the necessary financing and expertise to establish a successful Tribal Bingo Enterprise for the MORONGO BAND and is committed to the principal of assisting the MORONGO BAND to develop its own management capabilities and sources of revenue to continue this operation successfully without outside assistance at the end of the term of this Management Agreement: and

WHEREAS CBA is desirous and willing to assist the MORONGO BAND in establishing a successful and self-

sufficient Tribal Bingo Enterprise on the Morongo Indian Reservation;

NOW THEREFORE in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

1. *PURPOSE:* The purpose of this Management Agreement is to establish and operate a Morongo Tribal Bingo Enterprise on the Morongo Indian Reservation.

2. *TERM:* The Morongo Band of Mission Indians hereby retains and engages MANAGER upon the signing of this contract for a term beginning immediately upon the signing of this agreement and extending for five (5) years from the date of opening of the Morongo Tribal Bingo Enterprise, provided that said opening occurs not later than one hundred twenty (120) days after the date of the signing of this Agreement. Subject only to the provisions of Paragraph 5(g) regarding events beyond the control of the MANAGER, in no event shall the five-year term commence later than one hundred twenty (120) days after the signing of this Agreement.

3. *ENGAGEMENT OF MANAGER:* The MORONGO BAND hereby retains and engages the MANAGER to finance, construct, improve, develop, manage, operate, and maintain the Morongo Tribal Bingo Enterprise under the supervision of the MORONGO BAND. It is the specific representation of the MANAGER that it has the financial ability to and will provide the funding to finance the development of the site, the construction of the building, the installation of equipment and supplies, and that it will provide the necessary cash to commence operations in a total approximate amount of One Million Two

Hundred Fifty Thousand Dollars ($1,250,000) which MANAGER warrants it has available. The failure of the MANAGER to provide said funding for the construction and development of the Bingo facility or its inability to commence operation of the Tribal Bingo Enterprise within one hundred and eighty (180) days from the signing of this Agreement shall constitute a material breach of this Agreement and may, at the option of the MORONGO BAND, serve as just cause for the MORONGO BAND to terminate this Agreement and declare it null and void, unless MANAGER's failure to perform has been caused by government order, material shortages, strikes, riots, storm, flood, natural disaster, or any cause clearly beyond the MANAGER's control. A lack of financing shall not be considered a cause beyond the control of the MANAGER.

4. *COMPENSATION:*

A. GUARANTEED MINIMUM MONTHLY PAYMENT TO MORONGO BAND: Because the MANAGER warrants that it has the ability to make this Tribal Bingo Enterprise profitable and successful, the MANAGER guarantees the following minimum monthly payment to the MORONGO BAND: For the first month of operation, the minimum income guaranteed to the MORONGO BAND shall be Fifty Thousand Dollars ($50,000); for the second month of operation the minimum income guaranteed to the MORONGO BAND shall be Seventy-Five Thousand Dollars ($75,000); and for the third month of operation and for each and every month thereafter, the minimum monthly income guaranteed to the MORONGO BAND shall be One Hundred Thousand Dollars ($100,000). In order to secure this guaranteed payment, the MANAGER shall, prior to the first day of operation

of the Tribal Bingo Enterprise, establish an escrow account in the amount of One Hundred Thousand Dollars ($100,000). The location of the escrow account and the specific terms thereof shall be agreed upon in writing by the parties to this Agreement within sixty days of the date of the signing of this Agreement, but in no case later than ten days prior to the commencement of operations of the Tribal Bingo Enterprise. However, the basic terms of this account shall be that the MANAGER shall maintain a balance in this account of One Hundred Thousand Dollars ($100,000) at all times after the second month of operation. If the MORONGO BAND does not receive payment of the guaranteed minimum monthly amount required above by the sixteenth day of each month, then the MORONGO BAND shall present a sworn statement to the escrow holder stating the amount of money received and shall be entitled to withdraw such amounts as are necessary to bring the payment to the MORONGO BAND up to the minimum guaranteed payment for the month. Within five (5) days of being notified of any withdrawal by the MORONGO BAND from the escrow account, the MANAGER shall deposit the necessary amount to bring the balance in the escrow account up to One Hundred Thousand Dollars ($100,000). It is specifically agreed and understood by and between the parties that this guaranteed minimum monthly payment is to be considered a portion of the MORONGO BAND's seventy-five percent (75%) of the profits, but shall be paid to the MORONGO BAND even if it exceeds the share of the profits that would be due to the MORONGO BAND for that month. Notwithstanding the foregoing, the MANAGER shall be entitled to repayment of guaranteed payments made to the MORONGO

BAND in excess of seventy-five percent (75%) of the profits and accrual of unpaid management fees as more particularly set forth in Subpart "B" below, provided that profits from the Tribal Bingo Enterprise are available for such payment after the guaranteed monthly payments have been made to the MORONGO BAND, and after construction and start-up costs have been repaid each month as provided in Paragraph 6 below.

B. PAYMENT OF MANAGEMENT FEE TO MANAGER: In consideration of the performance of the duties as described herein, and provided that said percentage is available for distribution after the MORONGO BAND has been paid its guaranteed minimum income as set forth in subpart "A" above, and after the repayment of the construction and start up costs is made as provided in Paragraph 6, MANAGER shall receive as a management fee twenty-five percent (25%) of the net operating profits for each fiscal year resulting from and in connection with the operation of the Morongo Tribal Bingo Enterprise for the duration of this Agreement, unless it is sooner terminated as provided herein. In the event that the MANAGER shall be required to make a payment to the MORONGO BAND in excess of seventy-five percent (75%) of the profits in any given month by virtue of the guarantee ("payment shortfall"), as more particularly set forth in Subpart "A," above, the MANAGER shall be entitled to repayment of the payment shortfall from revenues at the first available opportunity providing that repayment shall not interfere with the MORONGO BAND's additional monthly guaranteed payments. In the event that there will be inadequate revenues to pay a guaranteed

payment to the MORONGO BAND and twenty-five percent (25%) of the profits to the MANAGER, the unpaid amount to the MANAGER shall accrue and shall be paid at the first available opportunity. (As used above, the term "first available opportunity" refers to the first regularly scheduled date for distribution of profits at which such funds are available.) By way of example, if in the third month the profits are Forty Thousand Dollars ($40,000), the shortfall shall be Sixty Thousand Dollars ($60,000). The MORONGO BAND shall receive One Hundred Thousand Dollars ($100,000) and the MANAGER shall be entitled to accrue Thirty Three Thousand Three Hundred Thirty Three Dollars ($33,333) profit as its twenty-five percent (25%) share plus repayment of the Forty Thousand Dollars ($40,000), both of which shall be paid when revenues are adequate to pay the MANAGER.

5. *CONSTRUCTION OF THE BINGO FACILITY:*

A. The MANAGER shall cause to be constructed or acquired a Bingo facility and related improvements on the Morongo Indian Reservation at the site approved by the MORONGO BAND acting through its Business Committee. The facility itself shall be approximately thirty-five thousand (35,000) square feet and shall be of sufficient size and capacity to safely and comfortably accommodate and provide refreshments for approximately two-thousand (2,000) seated patrons. There shall be provided sufficient parking and sanitary facilities to accommodate these patrons, as well as sufficient office space on premises for the effective management of the Enterprise. The Bingo facility shall have a water supply and sewer facilities

which adequately meet the needs of the Enterprise without adversely affecting the MORONGO BAND's adjacent lands. No equipment nor any part of the improvements shall be obtained through lease unless the MANAGER first obtains the written approval of the Business Committee of the MORONGO BAND.

B. Detailed site and construction plans and specifications for the Bingo facility and appurtenant improvements shall be submitted to the MORONGO BAND for consideration and approval within fourteen (14) days of the signing of this contract. The MORONGO BAND, acting through its duly-elected Business Committee, shall have six (6) days from the date of receipt of said plans and specifications in which to request any changes or to state any objections thereto. The MORONGO BAND's approval of such plans and specifications shall not be unreasonably withheld. The MANAGER shall make or cause to be made any changes or modifications that are timely and reasonably requested by the MORONGO BAND so long as such changes or modifications will not increase the total cost of the Bingo facility and its appurtenant improvements. Failure of the MORONGO BAND to disapprove of or object to the plans and specifications within the time allowed shall be deemed the MORONGO BAND's approval thereof.

C. Prior to the commencement of construction of the facility, the MANAGER shall submit copies of all contracts and estimated or actual costs to be incurred in the construction of the facility. Prior to the commencement of construction, the total cost for the development of the site, for construction of the facility, and for all fix-

tures, furnishings and equipment shall be approved and agreed upon between the parties in writing.

D. The MANAGER shall provide all funds necessary to construct the Bingo facility and its appurtenant improvements. The MORONGO BAND shall not be liable for any construction costs or financing costs other than for the repayment provided herein. The MANAGER shall obtain, as an expense of construction, performance and payment bonds in amounts sufficient to cover all costs and phases of construction. The MANAGER shall keep the Bingo facility, its appurtenant improvements, and the portion of the Morongo Indian Reservation of which they are a part, free and clear of all mechanics' and other liens resulting from the construction of the Bingo facility and its appurtenant improvements. These costs shall be included as costs of construction.

E. The MORONGO BAND, acting through its duly-authorized Business Committee, shall have the absolute right to enter upon the premises and to inspect all aspects of construction during the period of construction.

F. The building shall be constructed in accordance with all fire and safety requirements of the State of California and the County of Riverside, although those requirements would not otherwise apply on the Morongo Indian Reservation. Arrangements shall be made to have the building inspected for such compliance if practical.

G. The MANAGER shall commence or cause to be commenced the construction of the Bingo facility and its appurtenant improvements within thirty (30) days following the execution of this Agreement and shall exert its

best efforts to complete construction and commence operations within one hundred twenty (120) days of the signing of this Agreement. If the MANAGER is unable to complete construction and commence operations within one hundred twenty (120) days, the Manager shall pay the MORONGO BAND the amount of Three Thousand Three Hundred Dollars ($3,300) per day beginning one hundred twenty-one (121) days after the signing of this Agreement and terminating on the date on which the Tribal Bingo Enterprise commences operations. Any delays in the completion of construction of the Bingo facility and its appurtenant improvements caused by government order, material shortages, strikes, riots, storm, flood, natural disaster, or any cause clearly beyond the MANAGER's control shall be excused. A lack of financing shall not be considered a cause beyond the control of the MANAGER.

H. Title to any and all improvements and fixtures constructed or installed during the period of this Agreement shall vest solely in the MORONGO BAND. If any non-tribal government attempts to impose any possessory interest tax on either party to this Agreement regarding this Bingo operation, both parties shall resist such attempt. However, if a court of competent jurisdiction finally determines that any such tax is legally due, it shall be deemed an operating expense of the Morongo Tribal Bingo Enterprise.

6. *REPAYMENT FOR COSTS OF CONSTRUCTION AND START-UP:*

A. Upon the completion of construction, the MANAGER shall provide the MORONGO BAND with an itemized statement and back-up documentation substantiat-

ing the costs incurred for the construction of the building and for the equipment therein. The MANAGER shall also provide a detailed statement, accompanied by documentation, of all expenses incurred for the purpose of commencing operations of the Enterprise. In no event shall the MORONGO BAND be liable to reimburse the MANAGER for more than $1,250,000 of actual expenses incurred, nor shall the BAND be liable for any expenses for interest or financing associated with the funds utilized for the construction of, the equipping of, or the start-up costs of the Morongo Tribal Bingo Enterprise. All such interest and/or finance charges shall be the sole liability of the MANAGER and shall not be considered part of the net operating expenses of the business and are not to be reimbursed to the MANAGER by the MORONGO BAND. The documented costs shall be reviewed and approved or disapproved by the Business Committee of the Morongo Band within twenty days of their receipts by the MORONGO BAND. If any costs are questioned, the MORONGO BAND and the MANAGER shall meet and reach agreement on the amount to be reimbursed. The agreed upon documented costs for construction and commencing operations of the Morongo Tribal Bingo Enterprise shall be considered operating expenses of the Enterprise except as otherwise provided herein, and shall be repaid as follows:

(i) The repayment of any and all amounts determined to be due and owing to the MANAGER pursuant to Paragraph A above shall be considered part of the operating expenses of the Morongo Tribal Bingo Enterprise and shall be paid prior to the distribution of any percentage profits, except not prior to the minimum

monthly payments guaranteed to be paid to the MORONGO BAND pursuant to Paragraph 4 above.

(ii) Beginning with the distribution of funds from the first month's operation of the Morongo Tribal Bingo Enterprise, the MORONGO BAND shall reimburse the MANAGER one-twelfth (1/12) of the total documented and agreed upon costs incurred for construction of the facility and for the start-up of the Enterprise. This payment shall be made only to the extent that there are funds available to make such payment after the MORONGO BAND has its minimum monthly guaranteed income or such portion thereof as is available from the monthly profits of the Tribal Bingo Enterprise. If the full amount of funds necessary to make this repayment of one-twelfth (1/12) of the expenses incurred is not available from the profits of the Enterprise after the Morongo Band has received its monthly minimum guaranteed payment, then the construction repayment, or any part thereof not available, shall be deferred until after such time as all the other monthly payments have been made at the rate of one-twelfth (1/12) of the total costs. Any amounts not paid in the first twelve payments due to any inadequacy in proceeds shall be made on a monthly basis with no monthly payment to exceed one-twelfth (1/12) of the total costs of construction and start-up, beginning after the initial twelve (12) payments are due.

B. The MORONGO BAND's obligation to repay the expenses incurred by the MANAGER for the construction and start-up of the Morongo Tribal Bingo Enterprise shall only exist to the above extent and only for so long as the Morongo Tribal Bingo Enterprise is in

operation. If the Morongo Tribal Bingo Enterprise ceases operations as the result of a decision of a court of competent jurisdiction or by the operation of any applicable legislation, or for any other reason, the MORONGO BAND's liability for the repayment of the facility construction expenses and start-up costs shall cease; provided, however, that if, after terminating the Tribal Bingo Enterprise prior to the expiration of this Agreement, the MORONGO BAND reinstitutes Bingo anywhere on its Reservation within ten years of the date of this Agreement, the Contract shall be reinstituted for any portion of the term still remaining at the time of cessation of Bingo activity.

7. *MANAGEMENT DUTIES OF THE MANAGER:* In managing the Enterprise, the MANAGER shall perform the following duties:

A. The MANAGER shall provide the logistical support to the Enterprise, including but not limited to, the furnishing and the management of the materials and equipment. In addition the MANAGER shall provide the Enterprise with an initial cash contingency reserve of $250,000, included within the contemplated $1,250,000.

B. The MANAGER shall provide the Enterprise with personnel management, including the selection, training and supervision of all employees of the Enterprise; provided, however, that the employees to fill the top managerial positions within the Enterprise shall be selected jointly by the Business Committee of the MORONGO BAND and the MANAGER. The salaries of personnel shall be included in the operating expenses of the Enterprise.

C. The MANAGER shall provide for the services of a licensed, bonded and insured security force sufficient to reasonably assure the safety of the customers, personnel, moneys, and property of the Enterprise. The cost of such security services shall be included in the operating expenses of the Enterprise.

D. The MANAGER shall be responsible for the administration, management, maintenance, and operation of the Enterprise, except for those functions specifically assigned herein to the MORONGO BAND or to the Management Committee described below. The MANAGER is hereby granted the full authority, in its capacity as the agent of the MORONGO BAND, to carry out its responsibilities set forth in this Agreement subject to the general policy supervision of the Management Committee and the MORONGO BAND.

8. *MANAGEMENT COMMITTEE:* There shall be established a Management Committee which shall be responsible for overseeing the overall operations of the Morongo Tribal Bingo Enterprise, and for setting policy for the management of the Enterprise. This Committee shall consist of six (6) members which shall include three (3) representatives of the MORONGO BAND designated by the Business Committee of the Band and three (3) representatives of the Manager. This Committee shall meet as often as necessary but not less than once per month. Its functions will include establishing and overseeing the general policies of the Enterprise concerning employment, working conditions, employee training, expenditures, construction, improvements, procurement, publicity, and similar matters, but not the day-to-day operation of the Enterprise.

The three members of the Management Committee who are the MORONGO BAND's representatives shall be compensated for the time spent on the Bingo Enterprise and any expenses incurred therefor. Payment for this purpose, in an amount to be agreed upon by the parties to this Agreement, shall be made by the MANAGER directly to the MORONGO BAND as an operating expense of the Enterprise, and the MORONGO BAND shall make payment to the individuals involved who shall be responsible only to the MORONGO BAND.

9. *ANNUAL OPERATING BUDGET:* The MANAGER shall prepare an annual operating budget and submit it to the Management Committee for its review and approval at least thirty (30) days in advance of the agreed-upon fiscal year, except during the first year when the budget shall be presented to the MORONGO BAND's Business Committee for its review and approval at least thirty (30) days prior to the opening for business of the Bingo Enterprise. After the initial budget is approved, the Management Committee shall approve any changes made to said budget during the course of the year. At the beginning of each subsequent budget period, the Management Committee shall participate in the development of the budget and shall submit it along with its recommendations to the Business Committee of the MORONGO BAND for its review and approval. The budget shall be submitted to the Business Committee at least thirty (30) days before the beginning of the budget period and shall be reviewed and approved with any changes deemed necessary by the Business Committee within ten (10) business days of receipt of said budget. Failure of the Business Committee to re-

spond to the proposed budget in the time allowed shall be deemed an approval of said budget.

10. *ACCOUNTING AND BOOKS OF ACCOUNT:* The MANAGER shall prepare and provide to the MORONGO BAND a monthly, quarterly, and annual statement of all sales, revenues, and all other amounts collected and received and all deductions and disbursements made therefrom in connection with the subject Enterprise. The MANAGER shall also hire a mutually agreed upon independent accounting firm to perform an annual audit of the same. The costs so incurred shall be operating expenses of the Enterprise.

The MANAGER shall maintain full and accurate books of account at the MANAGER's office on the Morongo Indian Reservation in Riverside County, California. The books shall be kept on a cash basis and the records shall be maintained using generally accepted accounting principles. The MORONGO BAND, acting through its duly-authorized Business Committee, shall have the right to inspect, examine, and copy all such books and supporting business records during normal business hours. Such right may be exercised through an agent, employee, attorney, or independent certified public accountant acting on behalf of the MORONGO BAND. The MORONGO BAND shall have the right to review the fiscal operations at any time and to independently audit said books at reasonable intervals. The costs of up to one (1) such independent audit in any twelve (12) month period shall be included as an operating expenses of the Enterprise.

11. *CASH MANAGEMENT:* The MANAGER shall install systems for monitoring of all funds, which sys-

tems shall be submitted in advance of implementation to the Business Committee of the MORONGO BAND for its approval. Any changes in such systems will be subject to review by the Management Committee after commencement of the operation. The MANAGER shall have the right and duty to maintain and police its system for cash management in order to prevent any skimming of receipts or loss of proceeds from the Morongo Tribal Bingo Enterprise, and the MORONGO BAND shall have the right to inspect and oversee this system at all times. The MORONGO BAND shall also have the right to designate a person of its choice to be present and count or oversee the counting of the cash revenues on a daily basis who shall be paid as are the tribal representatives on the Management Committee.

A. The MORONGO BAND and the MANAGER shall agree on a bank for the deposit and maintenance of funds. The parties shall establish two (2) accounts in said bank, one for payroll and the other for a general account. Prior to each payday transfers shall be made from the general account sufficient to cover that payroll for all employees of the operation. The MANAGER shall retain all responsibility and authority for making all payments from the payroll account and shall provide the MORONGO BAND with a monthly report on payroll expenditures including the names and job titles of the individuals employed by the Tribal Bingo Enterprise. The general account shall require one signature each from the MORONGO BAND's duly authorized representative(s) and one from the MANAGER's representative(s). Each month, from the general account, all direct and indirect costs of the operation shall be paid, as provided herein;

and, the balance each month, excepting a reasonable reserve determined by the Management Committee, shall be divided and distributed between the MORONGO BAND and the MANAGER as provided in this Agreement.

B. All proceeds from the operation of the Morongo Tribal Bingo Enterprise, the sale of related products, snack bar revenues, and all other activities on the premises shall be deposited daily in the general account maintained jointly by the parties to this Agreement immediately after the termination of business. If the daily operation terminates in the late evening or early morning hours, all funds shall be deposited in the night depository of the selected bank. Adequate security shall be provided in transporting the funds to the bank; provided, however, that such funds as may be necessary for the next day's operation shall remain on the premises in a safe to be installed for this purpose. The parties hereto agree to obtation a transportation service to effect the safe transportation of the daily receipts to the bank.

12. *DIVISION OF PROFITS:* Within ten (10) days after the end of each calendar month of operation, the MANAGER shall calculate and report to the Business Committee of the MORONGO BAND the expenses and profit of the Enterprise for the previous month's operations; said profit shall consist of the amount by which the revenues generated exceed the operating expenses during said month. Operating expenses shall include, but not be limited to, salaries of personnel, employees and contractors; prizes; materials and supplies; utilities; repairs and maintenance of the subject property; employee benefit payments; insurance and bonding; advertising; accounting fees; security costs; costs to the MORONGO BAND

and the MANAGER for legal fees related to this Enterprise incurred for obtaining advice, preparation of documents, and litigation; equipment; trash removal; other expenses designated as part of the operating expenses in this Agreement; and such other expenses approved by the Management Committee and the Business Committee of the MORONGO BAND from time to time as operating expenses of the Enterprise. Repayment for construction and start-up costs as provided herein shall be considered part of the net operating expenses of the Tribal Bingo Enterprise, but shall not be paid until after the MORONGO BAND is paid its minimum monthly guaranteed payment as provided in Paragraph 4, above. Any profits remaining thereafter shall first be utilized for repayment of the start-up and construction costs, then for the repayment of any accrued amounts due the MANAGER, and finally for the division of profits between the MANAGER and the MORONGO BAND, with the MORONGO BAND receiving seventy-five percent (75%) of the profit and the MANAGER receiving twenty-five percent (25%) of the profits as fully set forth in Paragraph 4, above.

Not later than the fifteenth (15) day of each month, the MANAGER shall pay to the MORONGO BAND its minimum monthly guaranteed payment as provided in Paragraph 4 above. Next payment shall be made of the monthly payment due for the construction and start-up costs as provided herein to the extent that funds are available. Finally, to the extent that any funds remain availbale, the remaining funds shall be divided such that the MANAGER receives a return of any payment shortfall and its cumulative twenty-five percent (25%) of the profits after construction and start-up costs are repaid and

the MORONGO BAND receives seventy-five percent (75%) of said profits.

13. *EMPLOYMENT:*

A. In order to maximize the benefits of the Tribal Bingo Enterprise for the MORONGO BAND, the MANAGER shall place special emphasis on the recruiting, training, and employment of members of the MORONGO BAND and other qualified Indians. Preference in employment shall be given to qualified members of the MORONGO BAND, especially for the top management positions in the Moringo Tribal Bingo Enterprise. The MANAGER shall also give preference to qualified members of the MORONGO BAND when selecting contractors or subcontractors and when hiring personnel for the construction of the project, if such personnel are available. The wage scale for all employees shall be commercially reasonable after considering the job involved and the rates prevailing in the area and shall be established by the MANAGER, reviewed by the Management Committee, and approved by the Business Committee of the MORONGO BAND. The MANAGER shall make all reasonable efforts to provide on-the-job training for the employees and opportunity for upward mobility in employment as an operating expense of the Enterprise.

B. A background check shall be done on each applicant prior to his/her being hired and no individual with a felony conviction or ties to organized crime shall be employed by the Enterprise; provided, however, that the Management Committee may grant a waiver of this condition regarding felony convictions for members of the MORONGO BAND if the tribal member has been con-

victed of a felony which is completely unrelated to the work that he/she would do for the Tribal Bingo Enterprise. All individuals to be hired for positions which involve the handling of money must meet the minimum requirements for obtaining bonding; and all such employees shall be bonded upon their commencing employment with the Morongo Tribal Bingo Enterprise unless the Management Committee waives this requirement because of the expense involved.

C. The MANAGER shall adopt personnel policies, including a grievance procedure, in order to establish fair and uniform standards for the employees of the Enterprise. The policies shall be approved by the Management Committee and the Business Committee of the MORONGO BAND prior to the commencement of operations.

D. None of the shareholders in CBA shall be compensated for their efforts or for any work which they perform in their capacity as the MANAGER of the Morongo Tribal Bingo Enterprise, other than the percentage of net profits which they receive as the MANAGER of the Enterprise. A waiver of this provision may be granted by the Business Committee of the MORONGO BAND only if special circumstances arise in which it would be in the MORONGO BAND's best interest for such a waiver to be granted.

14. *INSURANCE:* The MANAGER shall maintain public liability insurance in the amount of at least $1,000,000 per person and $5,000,000 per occurrence for all activities on the subject property, and property damage insurance with liability limits of not less than $100,000 per occurrence with an aggregate coverage of $2,000,000.

Contractor shall also keep the buildings, improvements, and contents therein insured for their full replacement value against loss or damage by fire, with extended coverage endorsement, and robbery, theft, malicious mischief and vandalism. The exact nature and extent of such coverage shall be agreed upon by the parties. Both the MORONGO BAND and the MANAGER shall be named as the insured in all policies and the Manager shall supply the MORONGO BAND with written evidence satisfactory to the MORONGO BAND of such coverage. The costs of said insurance shall be deemed a part of the net costs of operation.

15. *USE OF PREMISES:* The MANAGER shall not conduct or allow to be conducted on the premises any illegal activities or any activities not approved by the MORONGO BAND.

16. *AUTHORITY TO EXECUTE:* Each party warrants to the other that it has full authority to execute this Agreement.

17. *NO PRESENT LIEN OR LEASE:* The parties to this Agreement agree and expressly warrant that this Agreement is not a lease and does not convey any present interest whatever in the building or property on which the Tribal Bingo Enterprise is located or any proprietary interest in the Enterprise itself.

18. *BEST EFFORTS:* MANAGER shall devote its best efforts to the fulfillment of its duties outlined in this Agreement.

19. *TERMINATION:*

A. TERMINATION FOR CAUSE: The MORONGO BAND may terminate this Agreement in the event

that the MANAGER commits or knowingly allows to be committed any theft or embezzlement. Either party may terminate this Agreement if the other party commits or allows to be committed any material breach of this Agreement. A material breach of this Agreement shall include, but not be limited to, a failure of either party to perform any duty or obligation on its part for any twenty (20) consecutive days within any 365-day period. Neither party may terminate this Agreement on grounds of material breach unless it has provided written notice to the other party of its intention to declare a default and to terminate this Agreement, and the defaulting party fails to cure or takes steps to substantially cure the default within twenty (20) days of receipt of such notice. The discontinuance or correction of the material breach shall constitute a cure thereof. In the event of termination for cause if the MANAGER is at fault, the MORONGO BAND will be paid all sums owed to it as of the date of termination, and the MANAGER will execute appropriate releases and will hold the MORONGO BAND harmless and undertake to indemnify it for any from all claims, notices, demands, liability, liens, mechanics' liens, stop notices, and similar contingencies which may follow such termination. If the MORONGO BAND is at fault, the MANAGER and BAND shall retain all moneys paid to and them and the MANAGER shall be compensated for construction and start-up costs to the extent that funds are available and to the extent that such costs have not previously been paid. Any funds remaining shall be divided seventy-five percent (75%) to MORONGO BAND and twenty-five percent (25%) to MANAGER, if the MORONGO BAND was at fault.

B. INVOLUNTARY TERMINATION DUE TO CHANGES IN APPLICABLE LAW:

It is the present understanding and intention of the parties that the establishment and operation of the Enterprise contemplated herein conforms to and complies with all applicable laws. In the event that this Agreement or the Enterprise is determined by the Congress of the United States, the Department of the Interior or a court of competent jurisdiction no longer to be lawful, the obligations of the parties hereto shall cease, and this Agreement shall be of no further force and effect; provided that the MANAGER shall indemnify and hold the MORONGO BAND harmless against all liabilities of any nature whatsoever created by or remaining after the termination of this Agreement; *provided further* that in the event that this Agreement and/or operation of the Enterprise is determined by the Congress, the Secretary of the Interior or a court of competent jurisdiction to be unlawful, the funds of the Enterprise remaining after final payment of operating expenses shall be distributed as follows: the MANAGER and the BAND shall retain all moneys paid to them and the MANAGER shall be compensated for construction and start-up costs to the extent that funds are available and to the extent that such costs have not previously been paid, provided that the MANAGER will execute the appropriate releases and will hold the MORONGO BAND harmless and undertake to indemnify it for any and all claims, notices, demands, liability, liens, mechanics' liens, stop notices, and similar contingencies which may follow such termination. Any funds remaining after the MANAGER is compensated for start-up costs shall be divided

with seventy-five percent (75%) given to the MORONGO BAND and twenty-five percent (25%) given to the MANAGER. The MORONGO BAND shall be entitled to retain title to all Enterprise fixtures, improvements, supplies, and equipment located on the MORONGO INDIAN RESERVATION.

20. *INTERFERENCE IN TRIBAL AFFAIRS:* The MANAGER shall not directly or indirectly interfere with, become involved in, or attempt to influence the internal affairs of the MORONGO BAND, its members, or its tribal government. The breach of this condition shall be grounds for immediate termination of this Agreement.

21. *SOVEREIGN IMMUNITY:* By this Agreement, the MORONGO BAND of Mission Indians does not waive, limit, or modify its sovereign immunity from unconsented suit.

22. *TIME IS OF THE ESSENCE:* Time is of the essence in the performance of this Agreement.

23. *NOTICE:* Any notice required to be given pursuant to this agreement shall be delivered by certified mail, return receipt requested, addressed to the MORONGO BAND as follows:

Tribal Chairman
Morongo Band of Mission Indians
11581 Potrero Road
Banning, CA 92220

with a copy to:

Barbara E. Karshmer, Attorney at Law
Frampton, Karshmer & Kesselman
925 N Street, Suite 150
Fresno, CA 93721-2256

and to MANAGER at

CBA Development Co., Inc.
4536 Wilshire Blvd., Suite 103
Los Angeles, CA 90010

with a copy to:

Roland Childs, Attorney at Law
Hertzberg, Childs & Miller
9454 Wilshire Blvd., Suite 500
Beverly Hills, CA 90212

24. *ASSIGNMENT, TRANSFER, OR ENCUMBRANCE:* This Agreement may not be assigned, transferred or encumbered by the MANAGER except with the written consent of the MORONGO BAND which retains the absolute right to deny consent to any proposed assignment, transfer, or encumbrance.

25. *CONSENTS AND APPROVALS:* At all places in this Agreement where approval or consent or other action of the MORONGO BAND is required, the MORONGO BAND's consent or approval will be granted or denied by formal action of the Business Committee of the MORONGO BAND and any such consent shall not be unreasonable withheld. In providing such consent or approval, the Business Committee will abide by the MORONGO BAND's written and unwritten custom and tradition in consulting with its membership, if necessary, regarding any action which it takes in regard to this Agreement.

26. *COMPLIANCE WITH TRIBAL REGULATIONS AND ORDINANCES:* In carrying out its obligations under this Agreement, the MANAGER agrees to comply with the duly-enacted Bingo Ordinance of the Morongo Band and with any and all other regulations or ordinances of the MORONGO BAND that are presently in effect or which may in the future be enacted.

27. *SUBMISSION TO THE U.S. DEPARTMENT OF INTERIOR:* This Agreement shall be submitted to the United States Department of Interior, Bureau of Indian Affairs for its review and approval. The parties agree to make any changes to this Agreement reasonably requested or required by said Department.

28. *EXECUTION IN DUPLICATE:* This Agreement is being executed in two duplicate originals, one to be retained by each party. Either is equally valid.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

CBA DEVELOPMENT CO., INC.

By: /s/ Douglas C. Bunce

MORONGO BAND OF MISSION INDIANS

/s/ Robert Martin
Tribal Chaiman

/s/ Hue Kab
Business Committee Member

/s/ Illegible
Business Committee Member

/s/ Paul Martin
Business Committee Member

/s/ Charles Martin
Business Committee Member

/s/ Illegible
Business Committee Member

/s/ Rodney Matthews
Business Committee Member

Approved by the Secretary of Interior
or his duly-authorized representative:

_____

_____ Date

10. REPORT, NATIONAL GAMBLING REVIEW COMMISSION

FINAL REPORT
of the
COMMISSION ON THE REVIEW OF THE
NATIONAL POLICY TOWARD GAMBLING
Washington: 1976

COMMISSION MEMBERSHIP

Charles H. Morin, Chairman
Attorney, Washington, D.C.

Ethel D. Allen, D.O.
City Councilwoman-at-Large
Philadelphia

Philip Cohen
Executive Director
National Legal Data Center

James M. Coleman, Jr.
Prosecutor, Monmouth County, N.J.

Joseph A. Gimma
Investment Banker, New York

Robert List
Attorney General, State of Nevada

Charles F. Phillips, Jr.
Professor of Economics
Washington and Lee University

Senator John L. McClellan
Democrat, Arkansas

Senator Howard W. Cannon
Democrat, Nevada

Senator Hugh Scott
Republican, Pennsylvania

Senator Robert Taft, Jr.
Republican, Ohio

Representative James M. Hanley
Democrat, New York

Representative Charles I. Wiggins
Republican, California

Representative Sam Steiger
Republican, Arizona

Representative Gladys Noon Spellman
Democrat, Maryland

James E. Ritchie
Executive Director

Marilu Marshall
Deputy Director

Former Members: Representative Charles J. Carney (D-Ohio); former Senators Edward J. Gurney (R-Fla.) and Marlow W. Cook (R-Ky.); Representatives John E. Hunt (R-N.J.) and Lawrence J. Hogan (R-Md.); and Judge David D. Dowd, Jr., former prosecuting attorney, Stark County, Ohio.

FEDERAL ENCLAVES

Indian Reservations

* * *

The Indian tribes once were separate and sovereign nations within what is now the United States, but through conquests and subsequent treaties, tribal units were placed under Federal protection, within specified grants of land. These grants in land, or reservations, were deemed to be "distinct political communities" subjected, by the Constitution, to exclusive Federal jurisdiction. States were therefore preempted from enforcing their laws within the reservation's territorial boundaries.

The Constitution delegates to the Federal Government the "power to regulate Commerce . . . with the In-

dian tribes." The commerce clause, however, has not been found to be the sole basis for Federal police power over Indian reservations, as it is in the regulation of such offenses as gambling. Additional police power in this instance stems from the Federal authority to regulate the territories, a power which is not dependent upon specific constitutional grant. This Federal power supersedes any tribal ordinances that may be in conflict with it, thereby nullifying such ordinances. Federal prohibitions do not, however, constitute the total regulatory body of laws by which Indian reservations are governed. The Assimilative Crimes Act permits the use of State statutes to cover offenses not covered by the Federal criminal code, and tribal governments are permitted to regulate offenses committed among Indians on the reservation.

While the Federal Government has retained a guardianship role vis-a-vis the Indian population, it is under no obligation to continue this role. Congress is the sole arbiter of when and how the present Federal role is to be changed or terminated, the Indians themselves are powerless to alter or suspend the existing relationship. In withdrawing Federal control, Congress can cause jurisdiction over the reservations to be delegated to the States, and, in fact, has taken steps in that direction by passage of Public Law 83-280. This statute granted civil and criminal jurisdiction over resrvations to the States, subsequent amendments included the requirement that tribal consent to a State's assumption of jurisdiction be given before such jurisdiction could apply. The statute contains specific language reiterating the principle that the respective State's criminal code would have the same

weight on Indian territory as it has throughout the rest of the State. While this statute was passed with an eye toward eventual termination of federal supervision in this area, it also made clear that such termination was to be effected gradually.

Perhaps the most controversial issue arising from Public Law 83-280 concerns taxation. The statute itself contains explicit language prohibiting State taxation of Indian concerns. Nevertheless, States have shown an understandable interest in taxing the Indians' economic activities in view of their increasing statute in the political and economic life of the State. State attempts to levy any such taxes have, to date, failed.

Of the myriad of Federal statutes dealing with prohibition of gambling activities, only one specifically prohibits a single gambling activity on an Indian reservation; the legalization of all other games is dependent upon State law. This statute, part of the Johnson Act, states:

It will be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special martime and territorial jurisdiction of the United States as defined in section 7 of Title 18.

The Commission fails to see any reason why, as to this particular activity, Indian reservations should not receive treatment consistent with State law. It does not consider the nature of the offense to be such as to warrant its continuing to be singled out as an area of federal jurisdiction while other types of gambling activity on the

reservation are subject to applicable provisions of State Law. The continuation of this policy is neither in the national interest, nor is it protective of one State's rights from infringement by a sister State. Consequently, the Commission recommends repeal of 15 U.S.C. 1175. To do so would then place all gambling activities under the control of applicable State law. The Commission further recommends that legal gambling activity of any kind conducted on an Indian reservation pursuant to State law should be subject to the same rate of taxation as that same activity conducted elsewhere in the State. That activity would presumably be subject to the same licensing and regulatory requirements whether conducted on or off a reservation. Therefore, the licensing privilege should be accompanied by the correlative duty of equal taxation.

* * *

BINGO

American women play a very strange game. Can't recall its name, but it's played in a large hall by several hundred women seated at tables with a number of small cards before them. A man on an elevated platform constantly calls out numbers to which the women listen attentively, never saying a word. Then suddenly one woman shouts at the top of her voice: "Bingo!" and all the others exclaim, "Aw nuts!"

Scarne's Complete Guide to Gambling

Although the above account is that of a bemused Englishman's first reaction to bingo, it represents a common—and inaccurate—perception of one of America's most popular and widely played gambling pastimes. Contrary to popular belief, bingo cannot be categorized sim-

ply as a parochial, low-stakes game played by middle-aged and elderly women.

It is, rather, a billion-dollar industry (much of it illegally whose popularity permeates all aspects of American society, and the abuses of which often go undetected or unremedied.

Bingo nonetheless holds a unique position among the various forms of gambling: Many people do not consider it true gambling at all. Because bingo sessions are usually run or sponsored by charitable organizations—churches, synagogues, service clubs, and the like—people tend to attribute to it a respectability they would not accord, say, numbers playing. Bingo operations—lawful or not—function so openly and are so numerous that many players never question their legality. And some would argue that the amount of money an average player spends on an evening of bingo—less than $6.00—is too small to be considered "gambling"; rather, they see it as an "entertainment" fee.

Background

The origin of bingo is obscure: It has variously been reported as an English, Dutch, or Swedish game. One gambling authority says it developed from the Italian parlor game of lotto, which in turn was based on the Italian National Lottery, now 450 years old. Another source claims it evolved from keno, a lottery popular in New Orleans in the 1840's. Revised forms of lotto and keno are still played today.

Whatever its origin, bingo has undergone a number of changes over the years. The 1863 American edition of

Hoyle lists bingo as a game played with dominoes. In the 1920's, movie theaters had bingo nights, which were actually raffles intended to increase business and circumvent State laws prohibiting such activities. At these raffles, the winner of a drawing would shout "Bingo!" to claim his prize.

Mechanics

Modern-day bingo, also known as beano, is a simple game, based entirely on chance and played until a participant wins. The games are often held in lodges, halls, church basements, and permanent "bingo parlors." Long tables are set up, and at each seat bingo cards and covering chips are placed. The cards, made of cardboard or paper, are printed with five rows of five squares each. One letter of the word BINGO appears over each of the vertical columns. All of the squares contain a number, except the "free" center square. Numbers 1 through 75 are used. The "B" column usually contains any five numbers between 1 and 15; the "I" column, any five between 16 and 30; and so on.

The purpose of the game is to cover enough called numbers to form a pattern—usually a vertical, horizontal, or diagonal line, or four corners. There are also many special games and gimmicks designed to increase participation.

In a typical game, the announcer calls a letter and number; randomly selected from 75 ping-pong-type balls printed with a letter from the word BINGO and a number from 1 through 75, in the same groupings as the cards. As these numbers are called, the balls are placed on a

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master board containing all the letters and numbers to form a record of the game.

The two most popular devices used to insure random selection of a ball are the bingo cage, a wire mesh sphere which is twirled to mix the balls and then stopped to allow one ball to fall out of the bottom, and the bingo blower, a glass enclosure in which the balls are kept aloft by a jet of air until one ball falls through a small opening.

When a person—or persons—shouts "Bingo!" the announcer and a floor person check the cards against the master board. If the cards tally, the winner or winners receive their prizes and a new game begins. As many as 90 or more games may be played at a single session.

Volume of Business

Because so much of bingo playing is illicit, and because reporting procedures are unreliable or nonexistent even in some States where the game is legal, a total estimate of money wagered on the game is impossible to make from official sources. So, too, for different reasons, is an estimate of the total revenue raised by the States through bingo licensing and taxation. An official of one State, however, has said privately that bingo there was a "huge" business, unpoliced, underreported, and answering only to the whims of local authorities. An indication of the success of the game can be seen in New York, where in 1 year the reported handle alone was nearly $200 million (from which the State realized more than $1 million in revenue).

From projection of data in its household survey, the Commission estimates that about $1.7 billion is spent—

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legally and illegally—on bingo in a given year. The average player bets $5.93 per session.

Bingo Regulation

At present, 34 States sanction bingo (see table 5-61). The methods, by which they license, tax, and regulate the game vary widely, however.

TABLE 5-61.—STATES PERMITTING BINGO

State	State approval	Local approval	License required	License fee	Noncharitable organizations	State tax	Total handle	Revenue to State
Alaska	yes		yes	$10 p.a.		N/A	N/A	N/A
Arizona	yes		yes	$75 p.a.	yes	N/A	N/A	N/A
Colorado	yes		yes	$50 p.a.		N/A	$11,937,450	$131,641
Connecticut	yes		yes	varies		N/A	N/A	N/A
Delaware	yes		yes	$15 p. event		N/A	$8,310,396	$39,780
Florida	yes		no	———		N/A	N/A	N/A
Illinois	yes		yes	$200 p.a.		10%	N/A	$6,842,946
Iowa	yes		yes	$10 p.a.		N/A	N/A	N/A
Louisiana	no	yes	yes	none		N/A	N/A	N/A
Maine	yes		yes	$2 p. week		N/A	$5,437,697	$24,210
Maryland	no	yes	yes	varies	yes	N/A	N/A	N/A
Massachusetts	yes		yes	$50 p.a.		5%	$73,333,897	$3,667,992
Michigan	yes		yes	$100 p.a.			$84,000,000	$189,260
Minnesota	no	yes	no		yes	N/A	N/A	N/A
Montana	no	yes	yes	N/A		N/A	N/A	N/A
Nebraska	yes		yes	$10 p.a.		10%	$5,364,563	$536,456
New Hampshire	no	yes	yes	$10 p. month	yes	N/A	N/A	N/A
New Jersey	no	yes	yes	$10 p. event	yes	N/A	$93,549,474	$331,375
New Mexico	yes		no	———		N/A	N/A	N/A
New York	no	yes	yes	$12.50 p. event		N/A	$182,312,388	$1,122,554
North Carolina	no	yes	no	———		N/A	N/A	N/A
Ohio	yes		no	———		N/A	N/A	N/A
Oklahoma	no	yes	yes	$25 + $5 p.a.		N/A	N/A	N/A
Oregon	yes		no	———		N/A	N/A	N/A
Rhode Island	yes	yes	yes	$10 p. event		N/A	N/A	N/A
South Dakota	yes		no	———		N/A	N/A	N/A
Tennessee	yes		no	———	yes	N/A	N/A	N/A
Vermont	yes		no	———		N/A	N/A	N/A
Virginia	yes		yes	varies		N/A	N/A	N/A
Washington	yes		yes	varies		N/A	$20,894,381	$ 73,130
Wisconsin	yes		yes	$10 p.a. & $10 p. event		N/A	$ 4,444,048	$345,859
Wyoming	yes		no	———		N/A	N/A	N/A
Kansas	yes		yes	$25 p.a.		yes	$10,658,252	$588,249
Nevada	yes	yes	yes	varies	yes	yes	N/A	N/A

About the only consistent factor in the States' treatment of bingo is their requirement that licensing be restricted to operations that are charitable in purpose. (A few States allow county governments, labor unions, political groups, or service clubs to conduct games as well.) In Michigan, for example, bingo licenses are issued only to "Religious," "Educational," "Veterans," "Fraternal," "Service," and "Senior Citizens" groups. (It should be noted that despite the ostensibly philanthropic motivations attributed to bingo sponsors, only 2 percent of the players who responded to the Commission's survey said they played bingo because it was in a "good cause." And in Nevada, where bingo is a commercial game like any other, the participation rate is higher than elsewhere.)

The authority for licensing and controlling bingo playing also varies widely among the States. In most, the State government is the licensing agent; in others, the county or other municipal government issues the permits; in Rhode Island and Nevada, authority is divided between State and local government.

The amount of the license fee, its distribution to the State and the community, and the manner in which it is imposed also differ greatly in the bingo States. Where there are license charges, annual fees range from $10 (e.g. Iowa) to $200 (e.g. Illinois). In some States, the operator is charged a fee every time a bingo event is held. In few cases does the fee appear to be prohibitive.

Gambling Survey Results

The National Gambling Commission's survey of American gambling practices and attitudes revealed that

bingo is a popular form of gambling whose appeal transcends specific sex, age, income, and education delineations. Nineteen percent of the population played bingo in 1974 (table 5-62). Of all types of gambling, legal and illegal, only lotteries enjoyed a higher participation rate than bingo, yet the bingo handle in 1974 was double that of the lotteries.

* * *

Because of the game's wide appeal, it is difficult to develop a profile of the "average" bingo player. Although the stereotype of a bingo player is a woman, 16 percent of the male population played bingo in 1974—more than bet on the horses or placed sports bets with bookies. The stereotypical bingo player is middle-aged or elderly, yet the survey results show that players under 25 had the highest proportional representation among all age groups, while players over 65 had the lowest.

Yet the stereotype is not entirely a myth. If all bingo players are divided into three groups on the basis of frequency of participation, the popular image of the bingo player appears among the 8 percent who play once a week or more. Middle-aged and elderly women, widows, and those earning under $5,000 a year are highly represented among the "heavy" bingo players. But among the great majority of players—the 75 percent who play less than once a month—distinctions on the basis of age, sex, income, marital status, and education are obscured.

Following are additional highlights of the survey results:

1. Bingo and Family Income (table 5-63). The average annual wager by bingo players earning under $5,000

was $142 in 1974; players in all but one of the other income categories wagered less than $100. The average annual wager for all players combined was $74. Only lotteries and sports cards had lower stakes.

Bingo is one of the more regressive forms of gambling, that is, those in the lower income groups spend proportionately more of their income playing it than those in higher income categories. It is less regressive, however, than numbers or sports cards, and about the same as State lotteries.

2. Reasons for Playing (table 5-64). Despite bingo's association with charity, most people do not play for charitable reasons. Bingo is viewed more in "social" terms than other forms of gambling; most players play "to have a good time," or for excitement or challenge. Less than a fourth of all players cited the chance to make money or to get rich as a reason for their playing. Among nonplayers, lack of interest was the primary reason given for not participating. About a third of the nonplayers cited money reasons. Adverse moral, legal, and societal consequences of playing bingo were rarely mentioned.

TABLE 5-64.—REASONS FOR PLAYING AND NOT PLAYING BINGO

Reasons for playing	Percent
Interest:	75
Good time, excitement, challenge Pass the time	
Money:	23
Make money, get rich	
Reasons for not playing	**Percent**
Lack of interest	94

Don't know or think about it, other things to do	
Money:	35
Costs too much, waste of money	
Moral Consequences	3
Legal Consequences	2
Social Consequences	4
Availability	5

NOTE: Participants choose one, two, or three reasons from among several reasons provided for playing or not playing.

3. Legal Versus Illegal Bingo (table 5-65). Fully 44 percent of those living in States where bingo is illegal believe it is legal, making bingo the form of gambling about which public knowledge is least accurate. The confusion may be partly due to the game's close association with respected community institutions such as churches and charitable groups and to the fact that a number of States permit charitable exemptions to their lottery and bingo prohibitions.

Of all forms of gambling, only bingo received majority support for legalization among people who live in States where bingo is currently illegal. Twenty-two percent of the nonplayers who did not know that bingo was legal in their State said they would play if it were legal. This represents a large potential market for the game.

* * *

BINGO AND THE LAW

Despite bingo's popularity as a charity fundraiser and its reputation as a harmless pastime, it has been the object of abuse by a number of sources: Illegal parlors resort to tricks to circumvent the law or openly defy it. Racketeers are thought to control bingo games—legal and illegal—in a number of urban areas. Skimming and other scams are practiced by both organized groups and shady independent operators. Some bingo players have devised elaborate cheating schemes.

Law enforcement officials appear to be of two minds regarding illegal or crooked bingo: One group feels that it is not a problem—and indeed, it often is not—or that the public wants it and the police have the responsibility of enforcing the law to the extent that the public desires. The other group, which feels crooked or illegal bingo is a problem, must often contend with an apathetic public and no investigative resources. It is probably fair to say that regarding illegal bingo operations, the police are damned if they do and damned if they don't.

ILLEGAL BINGO PARLORS. Some operators, to circumvent licensing requirements or statutory prohibitions, merely avoid using the word "bingo" and charge a fixed fee for a night of entertainment. That entertainment might consist of recorded music and "free" bingo games. At least one State has ruled that bingo is allowed if it is provided free during a paid entertainment. Other operators simply conduct open—and illegal—games, either moving from place to place and chancing the occasional police raid, or paying police officers to ignore the violation. In any event, penalties for bingo violations in most

States are minor and can be looked upon as a business expense.

RACKETEERS. Bingo takes in nearly $2 billion a year. Laws regulating bingo may be unenforced or ambiguous, and it is easy to rake off substantial unreported amounts of money taken in at the games. Thus, it is apparent that national or local organized criminal groups would be interested in bingo as a source of illicit income. A number of cities report that a single commercial bingo operation runs the majority of charity-sponsored games.

Some States have legalized bingo and set up control boards not to increase State revenues but to provide State supervision of games thought to be controlled by organized crime—particularly organization-sponsored games run by commercial operations. Legalization gives the States control over licensing and access to bingo records.

Even where the police want to investigate bingo operations thought to be infiltrated by racketeers, public sentiment often is against it. The bingo-playing public feels that an innocuous source of pleasure is being taken from them while the police ignore "real" crimes such as robbery. Churches and social organizations often sponsor the games despite the crime involved; the money these games bring in may be their charity's only source of support—even if the charity is not receiving its fair share from the dishonest bingo operators. State and local governing bodies are unwilling to spend the money needed to finance a thorough investigation of an area's bingo operations. And laws surrounding bingo may be so ambiguous that cases actually brought to court are often dismissed, and the few penalties imposed are rarely more than minor fines.

SCAMS. Skimming—the practice of underreporting income from games and pocketing the difference—is thought to be the biggest problem regulatory agencies and Law enforcement officials have with bingo. Skimmed money is tax-free. Not only do the Federal, State and local governments not receive their share of taxes from that income, but State or local governments that base their license fees on the income from a bingo parlor or that receive a percentage of the take also lose revenues. And the charities these games ostensibly support, as well as the players themselves, lose.

Skimming is easy to do and hard to detect because bingo players pay cash. To prevent skimming, both the number of players and the number of cards they play would have to be counted for each game. With thousands of games played at hundreds of bingo sessions each week in a given locality, it would be practically impossible for a municipality—even assuming it had the resources and the inclination—to check each operation. (A private survey of three bingo sessions in a large mid-western city found one session's take underreported by $1,000; the second by several hundred dollars; and the third to be even.)

Most bingo scams are simple: Not all games are reported to the regulatory authority, and the bingo operator merely pockets the money from the unreported ones. Skimming is even easier if the floor workers are involved: For example, after a collector turns over the money picked up from the tables, the counter (who tabulates each game's income) records a figure lower than the amount collected and keeps the difference. To avoid playing out the large jackpots advertised to lure players, some operators hire a player who works from a card recorded earlier with the

announcer. The announcer calls the numbers from that card to insure that the "plant" wins and the jackpot remains with the house.

CROOKED PLAYERS. Far fewer in number than the scams devised by bingo operators but much more intricate are the scams devised by individuals to cheat at bingo. Although most bingo payoffs are low, special jackpots of $1,000 or more might make the scheming seem worthwhile. One elaborate scam was developed by a family of three who, working with thousands of hidden memorized cards, were able to win some of the higher stake games by substituting winning cards from their hidden stacks. Another ploy involved the use of transparent card markers with numbers stuck to their undersides. If the player needed a certain number to win, he placed the corrected numbered marker on the card. Since the checkers read the numbers through the markers, the false number escaped detection. Today, the use of serialized and specially printed cards makes cheating by a player extremely difficult, and such cheating is not considered a problem.

CONSEQUENCES OF LEGALIZATION

The Commission's original research—especially its survey of gambling in America—has uncovered two facets of bingo playing that may contradict earlier perceptions of the game: Bingo is big business—nearly $2 billion annually—and it is played extensively throughout the United States where it is legal or not.

These findings will enable the States to evaluate their policies toward bingo and perhaps to change them. Following is a discussion of the issues surrounding bingo and

the possible consequences of increased regulation of the activity.

Although bingo is now legal in 34 States, regulation of it varies widely: Only Nevada and Maryland allow straight commercial bingo; in most other States, bingo may be played only for charitable purposes. Almost all the States require bingo licenses, but few have license control boards—licenses are merely filed with a State or local government office and are available, usually for a nominal fee, to anyone with an ostensibly charitable purpose. Most bingo operations keep few or sketchy records; often the statutes themselves do not require a strict accounting of income. Many times the charities these games are conducted to support receive only a small fraction of the money taken in. Law enforcement generally ignores illegal or dishonest bingo games: The few police efforts to crack down on these games are often resisted by the public, who want to play and see no harm in it; and most municipal or State budgets have few funds to spare for investigations. Many policemen believe that illegal bingo is a "victimless" crime, too insignificant to merit intensive enforcement.

It seems clear that few States have systems of bingo regulation that are effective or productive in terms of supervision, revenue raising, or law enforcement. Thus, States wishing to change their bingo policies find little to guide them.

In formulating bingo policy, the States must examine what their goals are, whether the benefits of effective regulation are worth the cost, and whether stronger regulation serves the public interest.

If the goal of increased regulation is to control illegal or dishonest bingo, States should realize that the effort requires considerable increases in money and manpower, as well as the active support of the community and its law enforcement personnel.

If revenues are the goal of bingo regulation, the States must be aware of how much money the games can be expected to generate. As with other forms of legalized gambling, there is a point at which operating costs and taxation decrease the payoff to the public to such an extent that the public turns to illegal games where the payoffs are higher.

If both ends—crime control and revenue—are desired, it may be possible to finance law enforcement efforts with the taxes received from the games. Whether this would still enable the State to have money left over for other purposes must be determined.

The Commission feels that the States should be aware of these issues as they develop their policies toward bingo. To that end, the Commission has drafted a model reguiation designed to insure a realistic, practical, and orderly approach to bingo for those States wishing one; that model regulation appears in an appendix to this Report.

CONCLUSIONS AND RECOMMENDATIONS

The Commission perceives little difference between "charitable bingo" and commercial bingo. Charitable bingo as it exists in most States is charitable only in that it is sponsored by statutorily sanctioned organizations such as churches and service clubs. It is operated, however, like a commercial operation: It offers large cash

prizes; it promotes elaborate games designed to induce participants to buy more—and often more expensive—ibngo cards to increase their chances of winning; and, most important, it is open to everyone, not just to members of the sponsoring organization. Many charitable bingo occasions are run by commercial bingo operations, not by the members of the sponsoring organization. The Commission's survey has found that people play charitable bingo for the same reasons they might participate in commercial bingo: Bingo provides entertainment and a chance to make money. The charitable aspects of the game are relatively unimportant. For these reasons, the Commission recommends, for regulatory purposes, no distinction be made between charitable and commercial bingo.

As stated earlier, bingo is a billion-dollar industry played by millions of people in every area of the country, whether it is legal or illegal. Bingo is also the most loosely regulated—or unregulated—form of gambling in America and as such is the object of numerous abuses which affect law enforcement, government revenues, and the players themselves. In addition, bingo is a highly regressive form of gambling, making it imperative that the State or local governing body take steps to control the game. Because of bingo's pervasiveness and the income it generates, the Commission recommends that those States allowing bingo adopt and actively implement regulations to insure that the games are honestly run.

Although it may be possible for a State to obtain certain revenues from legal bingo while actively enforcing the law concerning it, the Commission believes that where a choice must be made, a State should concentrate its re-

sources on the law enforcement aspects of bingo regulation. A minimal State tax on all bingo games could pay for the enforcement of bingo regulation. Whether a higher tax, which would provide revenue in addition to law enforcement, would still enable the game to attract players despite the necessarily lower payout rate is unknown. Unscrupulous practices such as skimming, as well as the suspected involvement of organized crime groups in some bingo operations, also support the contention that tax revenues from bingo should be concentrated on police efforts. The office of the State Attorney General should be responsible for enforcing the regulations.

Bingo's reputation as a harmless form of fundraising is not entirely deserved: Too often the charities these bingo operations ostensibly support receive only a minute portion of the handle from the games, and players who feel they are victims of unfair or fixed games have no redress. Therefore, the Commission recommends that all bingo regulations state what percentage of the handle must go to charity and what percentage of the handle must be paid out in prizes. The Commission further recommends that each bingo organization be required to obtain a bond with the State that could satisfy all adjudicated claims agains it. It also recommends that bingo operators be licensed by the State treasurer, as is the case in Massachusetts.

In order that any bingo regulatory scheme be administered most effectively, the Commission recommends that the States adopt an enabling act, where permitted by the State constitution, that would provide for a single bingo director. (That enabling act could be modeled after the model State Gaming Act, which will be included in an ap-

pendix to this Report.) The director would supervise the conduct of bingo within the State by promulgating regulations based upon the model provided. Under the enabling act, the bingo director would be appointed by the chairman of the executive body of the State gaming board. To be eligible for the position, a person must be of such character and reputation as to promote public confidence and trust in the administration of bingo within the State, and make a complete disclosure of assets and liabilities to the gaming board.

11. TASK FORCE REPORT

TASK FORCE REPORT
ON
LEGALIZED GAMBLING
TO
HONORABLE EVELLE J. YOUNGER
ATTORNEY GENERAL
STATE OF CALIFORNIA

June 21, 1971

Sacramento, California

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A considerable number of states have legalized bingo in one form or another. Of the states questioned on this matter, the bingo was found to be relatively free of criminal involvement.

Most states have experienced problems in regard to administrative control and operation of bingo games. However, these problems have usually been ironed out in time and with corrective legislation. The following comments regarding the history and development of legalized bingo in New York is somewhat typical of the development of the activity in other states.

Prior to 1958 the laws prohibiting bingo were only given token enforcement by the local enforcement agencies. As is true throughout the country, many religious and charitable organizations conducted bingo games openly for purposes of raising funds for religious activities.

In New York, bingo was legalized in 1958. With the advent of legalized bingo, racket minded promoters inevitably infiltrated vulnerable organizations and received the lion's share of the profits. The respectable name of the charity was used as a front and provided a buffer against legal prosecution.

Techniques employed by professional operators were to provide the finances, equipment, workers, and in some cases, suitable public halls, and to set up a full operation under a protective cloak of respectability. In exchange, the organizations were given a small share of the profits or a meager fixed fee.

Despite corrective legislation, the promoters found additional ways to insinuate their interests into the charitable activities. Their schemes eventually evolved into providing the services for acquiring licenses and completing the paper work necessary to set up the games. In this manner, they still managed to collect a large share of the profits.

The problems which evolved shortly after the legalization of bingo were basically as follows. Public hearings conducted in New York City by the State Lottery Control Commission reveal that the legalized game of bingo was rifled with abuses, corruption, and violations of law. Another vice was the misappropriation of inestimable sums that were intended to support religious, charitable, and civic causes.

New regulations and statutory correction of abuses closely followed the disclosures of the public hearings. The commission noted that the enactment of new legislation, rules, and regulations alone would not effectively eliminate the problems which had been encountered. Deliberate and purposeful enforcement by all responsible agencies of the states and municipal governments was required. The proper conduct of bingo was recognized to have rested primarily in the hands of the members of licensed organizations conducting bingo games.

In New York, the primary responsibility for the enforcement of legalized bingo comes within the jurisdiction of the State Lottery Control Commission (to be differentiated from the Division of the Lottery under the Department of Taxation and Finance). Aside from a short period after the program's inception, strigent regulations and effective control have finally resulted in a successful endeavor which is devoid of the "hoodlum element."

In other states, the evolution of legalized bingo may not have progressed through such a difficult period as that in New York, but the basic administrative and statutory problems have been much the same. The general opinion of both law enforcement and public administration authorities interviewed seems to confer approval on the legalization of bingo for civic, religious, and charitable purposes. On the whole, they felt that a properly regulated and conducted bingo game presented no law enforcement problems of substance.

The only abuses of legalized bingo which eventually became problems for law enforcement were those mentioned above. It is generally felt by the Task Force that these problems could be avoided should bingo be legalized in California, by establishing certain minimum standards for the conduct of bingo games. Among these standards should be the following:

1) Uniform state policy regarding the type of organization which may be allowed to conduct games;

2) Statewide (as opposed to county or municipal standards for regulation and conduct of games;

3) Organizations allowed to conduct games limited to those exempted from the payment of state in-

come tax under Revenue and Taxation Code section 23701 (d); *and* qualifying as charitable corporation under section 170 (c)(2) of the Internal Revenue Code of 1954.

4) Licensing of organizations intending to conduct bingo games by the chief of police or other chief law enforcement official in the political subdivision; or the sheriff of the county in which the game is to be conducted, if there is no small political subdivision;

5) No one other than the organization licensed to conduct games should be allowed to operate the games, or otherwise participate in the promotion, supervision, or other phase of the game for which payment for services would normally be contemplated;

6) Limits should be placed upon the frequency of games to be sponsored by one organization;

7) No individual, corporation, partnership, or organization, other than the corporation licensed to conduct games, shall be allowed to hold a financial interest in the conduct of the game;

8) A statewide supervisory agency should be established to insure the integrity of the games and the uniformity in regulation of the games.

These standards are not by any means all-inclusive, however, they should form the basis for ferreting out problems before they become major concerns. These standards should also receive further study (See part III, section A.).

* * *

12. DEPARTMENT OF INTERIOR LETTER

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the United States General Services Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

Signature
/s/ Franklin W. Burch
Name
Franklin W. Burch
Date
12/20/83
Title
Chief, Scientific, Economic, and Natural Resources Branch
Name and Address of Depository
National Archives—NNFN
8th Pennsylvania Avenue, NW
Washington, DC 20408

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington 25, D. C.

June 29, 1953

My dear Mr. Miller:

This will refer to your request for a report on H.R. 1063, a bill "To amend title 18, United States Code, entitled 'Crimes and Criminal Procedure', with respect to State jurisdiction over offenses committed by or against

Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State''.

I recommend that this bill be enacted if its title and text are amended to conform to the enclosed draft.

The bill would extend the criminal laws of the State of California to all the Indian country within that State. Concurrently, it would withdraw the entire State from the operation of the Federal Indian liquor laws. Finally, it would permit the courts of the State of California to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property is involved.

Approximately 30,000 Indians live in the State of California. They are divided into many different groups, widely dispersed throughout the State. Their lands include a large number of small rancherias and allotments, which are also widely scattered. The State lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in title 18, United States Code, section 1151, except in the case of the Agua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was conferred by the Act of October 5, 1949 (63 Stat. 705).

The applicability of Federal criminal laws is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of title 18, United States Code. As a practical matter, the enforcement of law and

order among Indians in the Indian country has been left largely to the Indian groups themselves, and in California they are not adequately organized to perform that function. The Indians of the Hoopa Valley Reservation and the Yuma Reservation have a form of tribal law enforcement, but none of the other reservations in the State has any means of preserving law and order. Consequently, there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State. The Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State. This has already been accomplished on the Agua Caliente Indian Reservation by the Act of October 5, 1949 (63 Stat. 705). A like policy should be applied to the rest of the State. In doing so due regard should be given, of course, to the safeguarding of the rights guaranteed the Indians by Federal treaties, agreements, and statutes.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H.R. 1063. No opposition to the enactment of the proposed legislation was voiced by any of the Indian groups. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State. Representatives of other groups have also indicated their approval.

Proposed legislation similar to H.R. 1063 has been discussed with the Governor of California and he has in-

dicated his approval of the objective of the proposal. The Legislature of California, by Senate Joint Resolution No. 29, has recently memorialized the Congress to enact H.R. 1063.

The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as these laws are of general application to private persons or private property. The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs or ordinances are not inconsistent with the applicable State laws. By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs.

The enclosed draft is designed to perfect H.R. 1063 in a manner consistent with its basic intent. The only major substantive difference is the omission of the provisions that would have excluded the entire State from the operation of the Federal Indian liquor laws. There is no doubt that the Indians of California are as prepared to be subjected to the State laws regarding intoxicants as they are to be subjected to the other laws of the State. However, general legislation to repeal, in whole or in part, the Indian liquor laws is now before the Congress, and it seems preferable to deal with the subject in that manner

rather than in a bill, such as H.R. 1063, having a different primary objective.

In large measure the criminal jurisdiction provisions of the enclosed draft are identical with those of H.R. 1063. The subsection that would have reserved to the Federal courts concurrent jurisdiction over offenses by or against Indians has been omitted as its effect would be to make persons in the Indian country subject to two different, and possibly conflicting, systems of law. For like reasons, a subsection has been added that would render inapplicable in California the Federal criminal laws which apply to offenses committed by or against Indians within the Indian country. Finally, the subsection relating to the protection of trust or restricted Indian property and of Indian fishing and hunting rights has been revised in an effort to make its provisions as precise and certain as possible.

The provisions of the enclosed draft relating to civil jurisdiction are based on those of H.R. 1063, but have been recast in a form that would permit them to be incorporated in the general body of the judicial laws as now codified in title 28 of the United States Code. These provisions are designed to give the State of California jurisdiction over civil controversies and transactions involving Indians to the fullest extent consistent with the discharge of Federal responsibility for the protection of trust or restricted property. The State and its courts could not take any action that would affect the status of this property in any way or that would improperly deprive the Indians of any of the benefits therefrom. However, once the trust or restriction was terminated by the United States, the juris-

diction of the State and its courts would automatically attach.

Both H.R. 1063 and the enclosed draft would repeal section 1 of the Act of October 5, 1949 (63 Stat. 705), which conferred on the State of California civil and criminal jurisdiction over the land and residents of the Agua Caliente Indian Reservation. The enactment of H.R. 1063, applicable to the entire State, should be accompanied by the repeal of section 1 of this Act in order to make the same civil and criminal jurisdictional statute applicable to all Indian country within the State.

Since I am informed that there is a particular urgency for the submission of the views of the Department, this report has not been cleared through the Bureau of the Budget and, therefore, no commitment can be made concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

/s/ Orme Lewis
Assistant Secretary of the Interior

Hon. A. L. Miller, Chairman
Committee on Interior and Insular Affairs
House of Representatives
Washington 25, D. C.

Enclosure

13. WALLACE DECLARATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

CABAZON BAND OF MISSION INDIANS, A Federally Recognized Indian Tribe,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants.

and

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants.

DECLARATION OF WILLIAM J. WALLACE

DECLARATION OF WILLIAM J. WALLACE

I, WILLIAM J. WALLACE, declare under penalty of perjury as follows:

1. I am a Professor Emeritus of Anthropology at the California State University, Long Beach and have been so since 1970. Further I have earned A.B. and Ph.D. degrees in anthropology from the University of California, Berkeley. University work included undergraduate and graduate courses and seminars in California and western history. I am familiar with the subject matter of this litigation; and if called could testify as follows. A copy of my curriculum vitae is attached.

2. I have prepared a report describing Indian cultural gambling traditions in California. A copy of the report is attached. Based on my research, and as described more fully in my report. I conclude as follows:

> "The Indians of California have often gambled intertribally, and, on festive occasions, with other tribes. However, the Indians of California have not traditionally engaged in commercial gambling, or operated commercial gambling establishments. Also, the Indians of California have not, to any significant degree, traditionally engaged in gambling with non-Indians on either a commercial or non-commercial basis."

I certify under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 1984 at Redono Beach, California.

/s/ William J. Wallace
Declarant

3.

California Indian Gambling

"Let us gamble," a Yaudanchi Yokuts said and the game began (Kroeber 1925:540). These words or very similar ones were frequently heard in California Indian communities, for gambling was a favorite preoccupation of the native peoples. Women entered into games of chance as heartily as men.

Contests of physical skill between individuals or teams afforded another outlet for the gambler. The participants themselves wagered on the outcome of matches. Additionally, a good deal of betting went on among onlookers.

But to suppose that the native Californians were obsessed with gambling would be wrong because the great majority did not let interfere with their ordinary lives. The average individual played now and again for fun or relaxation. But for a few, gaming became a devouring passion and occupied a good part of their time and thoughts. However, such persons did not form a professionel class of gamblers, for no one gained a full living from the habit.[1]

Games of Chance

Each group had its own traditional games of chance. Nothing is known as to how and when the various forms were introduced to the different tribes. The native peoples believed that they had been played since time immemorial as they were indulged in by mythical personages before mankind arrived.

The playing of the traditional games of chance depended upon individual rather than group initiative. Customarily, a few interested males or females got together and arranged for a match. The village or tribe as a whole never initiated, organized, or ran the contests.

Gaming took place almost anywhere and at any time. But there were limitations. In some tribal groups, it had to be done at a special location. Pomo men, for example, gambled only in the sweathouse (Loeb 1926:215). Women, normally barred from entering this structure, were admitted as spectators while play was in progress. Western Mono males also held their favorite hand game competitions in the sweathouse (Gayton 1948b:269). No special gaming halls, that is buildings designed solely for gambling purposes, were ever erected by native Californians.

Often a game of chance could be indulged in only at a particular time of day or season of the year. The Tachi Yokuts allowed the playing of the men's hand game just at night (Gayton 1948a:22), whereas Yokuts and Western Mono women were forbidden to cast dice after dark (Gayton 1948b:269). Yana men competed in hand game contests only during the fall and winter. The matches had to stop before the oaks came into leaf, lest there be no acorns to gather and to eat (Sapir and Spier 1943:279). By contrast, Eastern Shasta restricted hand game playing to the summer months (Voegelin 1942:99).

There were also individual restrictions. A Pomo man did not gamble if he had a newly born child or his wife was menstrating (Barrett 1952:335), nor did a Coast Yuki whose wife was pregnant engage in games of chance (Gifford 1965:66). No Yurok could begin a contest of any sort

during the important Deerskin Dance festivities until all families that had lost a member during the year had been compensated (Curtis 1924, 13:48).

Games of chance were played with great concentration and gusto. Often a match continued without let-up for many hours, or even for two or three days. Shasta players never slept while a contest was in progress (Holt 1946:314). Atsugewi gamesters, however, occasionally took an hour off to rest (Garth 1953:173).

Gentlemanly conduct was expected. Normally, victories and defeats were quietly accepted, for niceties of behavior, prevented exalting over winning or bemoaning of losses. A Yuki loser graciously said. "Well my friend, you win, I give up." (Foster 1944:196-197). Stephen Powers, a pioneer student of California native culture, remarked, "One thing is praiseworthy about these Indian gamblers, that is the good nature with which they accept their losses. They very seldom quarrel and never fight unless inflamed with white man's . . . (bad water)" (Powers 1877:191).

Nonetheless, an individual who wanted badly to win sometimes resorted to illegal means. Perhaps the most extraordinary thing about this dishonesty was that none of it was regarded as particularly reprehensible. Elder Pomo men boasted how they used to hoodwink opponents (Loeb 1926:234), as did Yokuts cheaters (Aginsky 1943:419). No real penalty was inflicted if cheating was detected; the guilty side, as in Yuki and Pomo society (Foster 1944:195; Loeb 1926:214), merely forfeited the pot. A Yuki Indian expressed the view that play had been more honest in

prewhite times. "But today the object is to cheat whenever possible" (Foster 1944:195).

Big games involving well-known players engendered considerable interest and high excitment. Spectators gathered to watch and to urge on their favorite. And, to place side bets.

In aboriginal times, wagers consisted mostly of shell money, though other valuables were also staked. A bet was always matched by an article of equal value; no odds were figured or given.[2] The wagers ventured were usually quite modest. For example, the regular Tubatuabal bet amounted to the equivalent of $2.00 in shell money (Voegelin 1938:47). But in the intensity of the moment, a gambler sometimes risked all his earthly possessions. A Yurok narrative tells of a man who, having lost everything, even his clothing, pledged his personal liberty (Spott and Kroeber 1942:149). He lost again and became a slave to his adversary. Owens Valley Paiute men are said to have occasionally gambled away their wives or children (Steward 1933:285).

The games of chance were of two types: guessing and dice. Lotteries or any sort of contest in which prizes were determined by lot were unknown. Nor did the native Californians originally have any board games like checkers.[3]

The wagers were placed and won or lost by individuals or, less often, competing teams. The village or tribe as such never put a comon bet, even if the opponents were outsiders. Nor did the political community or any political authority receive any part of the amount risked. Aside from a small percentage paid to a referee or umpire, the

entire sum wagered went to the successful bettor or bettors.

Guessing Games

Guessing games were played almost exclusively by males. Over much of California, the hand game (also known as the grass game and peon) was foremost. Details varied locally, but essentially involved guessing the whereabouts of an "ace" or marked piece. Usually two short lengths of bone or cylinders of wood, small enough to be easily concealed in the hand, were used. One (the "ace") was marked about the center with a band. Two competitors or two opposing sides sat facing one another during play. One contestant shuffled the gaming pieces behind his bank, under a blanket, or between bundles of grass. The opposing side then guessed which hand or grass bundle held the marked one. If the surmise proved correct, the guesser gained a point; if wrong, the opposing side did.

Score was kept with eight, ten or more splints of wood. Quite frequently, as with the Miwok (Barnett and Gifford 1933:206), an umpire dispensed the counters. The umpire received a small percentage of the stakes for his services, but he was not permitted to bet on the outcome of a contest. Usually, play began with a common pile of sticks. Only after this had been depleted did the contestants draw from one another. Play went on until one side gathered in all the counters. More rarely, each side started with half of the sticks.

Success in the hand game demanded expert manipulation of the gaming pieces as well as long practice. The hand game has been characterized as one ". . . in which not sticks and luck but the tensest of wills, the keenest of per-

ceptions and the supplest of muscular responses are matched" (Kroeber 1925:540).

Players resorted to all sorts of antics, stratagems, and false moves to dazzle and confuse their opponents. With the playing went an almost constant singing of special hand game songs. Often, too, a log or plank was thumped with a paddle in time with the singing.

Ways of cheating were many and various. Most commonly, the "ace" was surreptitiously shifted after an adversary had made his choice. A yuki deceiver kept a duplicate set of bones hidden in the loose straw, and by a sleight of hand displayed a piece opposite to that guessed (Foster 1944:195). One Yuki gambler owned a trick pair with both bones marked on one side and plain on the other. When a selection had been made, he showed the opposite side. The same artifice has been reported for the Achomawi (Curtis 1924:13; 145).[4] To prevent trickery at the critical moment, Diegueno players were obliged to attach the bones to their wrists with leather thongs (Waterman 1910:331). Onlookers sometimes assisted a Pomo contestant by positioning themselves behind the players so as to be able to see what move was being made. They signaled the position of the "ace" by means of traditional finger signs (Loeb 1926:214).

A second game, often called "Indian cards", had a more limited distribution. It was the sole guessing game of the northwestern tribes, including the Hupa, Yurok, Tolowa, and downriver Karok. Among neighboring groups and farther eastward it existed alongside the hand game. In playing, fifty or so slender wooden rods, one identified by a black band around the middle, were shuffled behind the back and divided into two bunches. After considerable

deliberation and frequent false or pretended starts, an opponent guessed which hand held the marked splint. Eastward, a few tribes added the feature of rolling the sticks up in grass bundles (Voegelin 1942:101). As in the hand game, score was kept with stick counters.

Singing accompanied the play. A drum made of a box with a cover of leather or hide was also usually beaten (Goddard 1903:6). This drum was not aboriginal.

Opportunities for trickery were not lacking. A good Yurok player knew at all times which hand held the marked splint and sometimes deftly shifted it from one hand to the other following his adversary's guess (Kroeber 1960:236). Clever Chilula gamblers secreted the "ace" under one leg instead of holding it in the hand. Thus, whichever hand was guessed held no marked stick (Driver 1939:399). While their opponents were engrossed in watching for the "ace" to appear, these tricksters slipped it into the pile which had not been chosen.

Also played with a bundle of thin sticks was a guessing game that enjoyed popularity in central and northern California. In one of these contests, a player separated a handful of splints from a bundle and held them out to his opponent. The latter had to guess whether the number was odd or even. In a Pomo and Miwok variant, the sticks were counted off by fours, the choice being made whether the residue numbered one, two, three or four, four being equal to none (Barrett 1952:341; Barrett and Gifford 1933:268).

Of a different order was a contest in which four sticks, two long and thick, two short and thin, were employed. The four were lined up beneath a flat basket, in one of four

possible arrangements. The object was to guess the grouping. "Four stick" was played along with other guessing games by tribes living in north central and northeastern California. It has been reported for the Modoc, Achomawi, Atsugewi and Northern Paiute (Voegelin 1942:10; Stewart 1941:398).

Native Californians indulged in a few additional guessing games. In one of these, two competitors simultaneously drew a combination of short and long lines on the ground, shielding their drawing with a basket held in the other hand. A man won if his pattern of lines matched his opponent's. Matching lines was played by Miwok, Yokuts, and Western Mono groups (Driver 1937:82). In a Mohave game, a bit of wood was hidden in one of several little piles of sand and the other side tried to divine its placement (Drucker 1941:131). Another, quite simple, game involved secreting a tiny stick or a pebble between the fingers and the palm of the hand. An opponent tried to determine under which finger it lay. This was played by the Nisenan (Powers 1877:332-333), Achomawi, Atsugewi (Voegelin 1942:100), and perhaps other tribes living in north-central California.

Dice Games

Gaming with dice was almost everywhere predominantly a female diversion. The contests depended on pure chance, the random fall of one or more objects. No real element of skill entered into them. Nor was there any opportunity for chicanery. Usually two women contended, but two or more might make up a side.

With one exception, the dice had two faces. Most commonly used were split sections of wood, four to eight or

more inches in length. A set numbered four, six or eight. Flat on one side and rounded on the other, the staves were cast from the hand onto a circular basketry tray, against a stone, or on the ground. The combination of flat and rounded faces determined the score. In southern California, and sometimes elsewhere, the staves were colored.

Dice fashioned from shells of native Black Walnut were widely employed in the San Joaquin Valley and adjacent foothills (Driver 1937:83; Aginsky 1943:423). They were also used in the southcentral and central California coastal regions (Harrington 1942:27). The nut was split in half, the kernel removed, and the halves filled with pitch or asphaltum. Bits of shell were pressed into the soft filling. The number of dice varied from six to eight. Now and again, split acorns or acorn calyxes were substituted for walnut shell.[5] The count was based upon how many shells fell mouth up and mouth down.

In northwestern California, four mussel shell disks, each with a shiny surface from the shell's inside and a rough one from the outside, were dropped from the hand (Driver 1939:34). One pair was somewhat larger. If all four disks fell with the same side up, whether rough or smooth, or if the size pairs were uniform but opposite, a point was scored (Kroeber 1960:234). Four beaver teeth, marked on one side and plain on the other, were used by Modoc dice players (Ray 1963:129-130).

As in the men's guessing games, score was most often kept with sticks and a contest terminated when one side won all the counters. A tally counter sometimes handed out the sticks. A Wukchumni Yokuts score-keeper was "paid a little" (Gayton 1948a:91). Along the eastern fringe

of the state and in a few Yokuts groups a counting circuit replaced the pool of sticks (Aginsky 1943:423; Driver 1937:83; Riddell 1960:77-78). The circuit consisted of 28-32 wooden pegs stuck in the ground so as to form a curving line or half circle. Sticks placed between the pegs indicated positions of the several players.

Female gamblers tended to wager only small sums. For example, a Wukchumni Yokuts dice player bet shell money, a basket, or some object that her opponent specifically desired that rarely exceeded $2.50 in value (Gayton 1948a:91). A 1772 account of Southern Valley Yokuts dicing mentions that each contestant wagered "some little article appropriate to woman's use" (Priestley 1933:75). However, some females did play for very high stakes. Between women of wealthy Wiyot families the sums wagered were large (Curtis 1924:13, 78).

Less ambitious than the men's guessing games, dicing contests attracted scant public attention. Quite often, they were pick-up affairs, engaged in at odd intervals when females found a few free moments. Also, there appear to have been relatively few restrictions on playing. Menstruating and pregnant women, for instance, were not barred from watching, or, for that matter, participating (Gayton 1948a:91).

A single, four-sided die was cast by central Californians. This comprised an unworked deer or elk astragalus. The value of a throw depended on which of the bone's four sides fell up. Any number of persons, male or female, played (Barrett 1952:354). Apparently, a deer's knee bone or, following white contact, a cow's footbone was occasionally substituted for the astragalus (Gifford and Kroeber 1937:147; Harrington 1942:271).

Games of Physical Skill

In all parts of California gambling was a regular feature of contests that required individual dexterity, speed, or strength. Bowmen competed either for accuracy or distance in archery contests. Frequently the stakes were only arrows, but shell money or other valuables were sometimes bet. In northwestern California, big wagers were laid on the result of intervillage wrestling matches. Footraces for speed or distance often attracted betting. The Kamia ventured horses, blankets, and money on a grueling footfall race in which two contestants cast or kicked wooden balls by foot (Gifford 1931:45). The distance covered was two to three miles and back to the starting line. Northern Paiute and Achomawi men laid bets on shot putting contests in which a heavy rock was put (Stewart 1941:400-401).

To the Mohave and the Yuma, hoop-and-pole was considered the means of gambling best befitting a man (Kroeber 1920:2 2). In this sport, a small string-wound hoop was rolled and long poles were slid over the ground so as to fall, if possible, on or under the hoop as it came to rest. Hoop-and-pole or something akin to it was played elsewhere in California, but with considerably less intensity. Interestingly enough, the Yurok forbade betting because hoop-and-pole had a mythical connection and was as much a ritual as a game (Kroeber 1960:232).

Of field sports, shinny, a sort of hockey, was the favorite for betting as competition brought members of different villages or even tribes into opposition. Among the Cahuilla, social divisions within the tribe contended (Bean 198:380). Shinny matches were rough and hard-fought. The Yuki claim that in the early times the game

and played purely for sport; only in post-white times did small-scale gambling creep in (Foster 1944:197).

In all of these sports, individual and team, participants and spectators placed bets. Teammates pooled their wagers and, if victorious, divided the stakes. A small percentage of the sum risked often went to an umpire, who oversaw the match and enforced the rules.

Gambling Luck

Throughout California gamblers sought to gain good fortune and to ward off ill luck by magico-religious means. There were many ways in which this was done.

In several parts of California, serious gamblers went on deliberate guests for supernatural aid. A Pomo searched for something unusual such as a mountain plant growing in a valley (Loeb 1926:216). When he found one, he took the leaves and recited: "lucky streak—happen me—win—will happen I." The supplicant always left a small offering, perhaps eight small beads, at the spot.

More stringent quests were also undertaken. A Shasta gambler spent five nights beside a sacred lake in the mountains (Curtis 1924:13,125). Here he swam in the cold water, laid on a bed of stones, ate little, scratched his flesh and rubbed a certain root into the wounds. At all times he had to keep his thoughts firmly fixed on the purpose of his quest.

Supernatural help came more easily to Mohave gamblers, in dreams during an ordinary night's sleep. When a Mohave man dreamed that he wrestled an adversary and threw him, this meant success in gaming (Wallace 1947:155). To the Diegueno hoop-and-pole player, the hoop

was woman of whom he dreamed. If she liked him, he won, no matter how the pole was thrown (Spier 1933:355).

Certain rocks, roots, or even living creatures were thought to bestow good luck. A "lucky rock," a strange looking pebble or one that resembled a familiar object like a pestle, brought a Pomo gambler success (Barrett 1952:335). Feathers of certain birds, and angelica root (*Op.cit.*:328) or a bit of wood blackened by lightning (Loeb 1926:216) did likewise. To a Yuki gamester an unusual rock or a lizard with a forked tail was a potential luck charm (Foster 1944:196). But for best results it had to be doctored by someone who knew the proper procedures and correct invocations. The Surprise Valley Paiute held a horned toad or a shiny, bluish-black insect "like a fly only about an inch long" to be of help (Kelly 1932:169).

Charged with extraordinary power, charms were potentially dangerous to women, children, and the ill. Contact with them could bring either illness or death. For this reason a Surprise Valley Paiute gambler seldom employed his horned toad or insect talismen because, "If one used these charms while playing with a sickly person, that person might die. Both charms are dangerous; they are bad, at the same time they are good" *(Ibid)*.

Gamblers carefully prepared for a match. Almost always a man avoided sleeping with his wife or another woman, because of a widely-held belief that gaming success and relations with the opposite sex were incompatible (Kroeber 1920:277). On the day of a match a Pomo contestant followed a strict regimen. He rose early, bathed in cold water, sang gambling songs, and rubbed lucky rocks on his body (Barrett 1952:336). A Yuki gambler bathed

in cold water and fasted all day (Foster 1944:196), whereas northwestern Californians recited special formulas for success. The words of a Karok formula recount how a gambler got ready for play (Gifford and Kroeber 1980:294). Kamia men sometimes took narcotic Jimsonweed before a match (Gifford 1931:46).

Certain actions and restrictions also accompanied the actual gaming. To bring luck, a Diegueno hand-game player rubbed a powder made from dried flowers of a particular herb on his face and breast, and furtively threw a little on the fire which burned at one side (Waterman 1910:332). He also tried to jinx his opponent. The tails of small snakes were cut off dried and pounded into a "powder." Thrown into the fire, it was thought to "poison" the other side "a little," forcing them to give up the bones quickly. Tarantulas and trap-door spider "powder" served the same purpose. Yuki players might be "doped" by poisoners during a game (Foster 1944:196).

Negative elements surrounding game frequently included fasting. A Pomo gambler neither ate nor drank while engaged in a match (Barrett 1952:334); Karok players never smoked (Harrington 1932:254). Restrictions frequently extended to non-players, especially females. Under no circumstance was a Yuki or a Pomo woman allowed to pass behind a player in a grass game because she might be menstruating and cause immediate loss of luck (Foster 1944:195; Loeb 1926:215). A menstruating Modoc woman was never allowed to watch a contest (Ray 1963:125). While a Shasta husband gambled, his wife had to be careful what she ate (Dixon 1907:443). Dry fish and acorns were her only foods. Too, she drank only water in which acorn-meal had been stirred.

Gambling in Society and Culture

Games and gambling enlivened practically every social or ceremonial occasion. At Wintu gatherings, games of chance provided the biggest attraction (Du Bois 1935:43). Contests of prowess and skill, dancing, singing, and feasting all formed part of the festivities, but they represented mere intermissions in the seemingly interminable gambling games. The greatest opportunity for Death Valley Shoshone gaming came after the pine-nut harvest when families met for a fall ceremony that constituted more of a social than a religious affair (Wallace and Wallace 1979:33).

Intensive gambling characterized practically all inter-village-or-tribal gatherings. Representatives of different communities or tribes competed in games of chance. Western Mono gamblers made an annual trek to Yosemite Valley to play against Southern Miwok rivals (Curtis 1924, 14:137). Shinny games between villages or tribes heightened interest and attracted heavy wagering.

Native Californian saw no incongruity in combining gaming with their most sacred ceremonies. One day of the Hupa White deerskin Dance was given over to gambling (Goldschmidt and Driver 1940:126). Players representing the upper and lower ends of Hoopa Valley contended in "Indian cards" and women occasionally cast dice. Archery contests in which bets were laid on the outcome took place while a Karok priest was performing preliminary rites for this same ceremony (Curtis 1924, 13:62). Hand games accompanied the important Ghost Ceremony of the Pomo (Loeb 1926:215), while two men from different social divisions engaged in "matching lines" on the last day

of the Tulare Lake Yokuts Annual Mourning Ceremony (Gayton 1948a:22). All sorts of contests followed this solemn Yokuts ritual which honored the year's dead (*Op.cit*:44). Throughout the night preceding the final dramatic act—the burning of images of the deceased—of the Pass Cahuilla Ceremony for the Dead, men competed in hand games around campfires (Strong 1929:29).

California Indian mythology was replete with gambling episodes. Supernatural beings played and presumably invented the same games played by the Indians who followed them. "Gambling at Dentalium House," a Yurok myth, told how a young Pekwon man won at "Indian cards" (Kroeber 1976:402-403). In a Mohave epic, Gambling Boy competed in hoop-and-pole, though not very successfully (Kroeber 1951:78-82).

Luck came to mythical gamblers in various ways. The Hupa told a series of stories about finding a supernatural creature which gave the finder luck (Wallace 1948:354-355). An oft-told tale of this same tribe recounted how a man acquired good fortune through a harrowing quest (Curtis 1924, 13:183). Gilak, a cannibal being, bestowed luck on a Pomo gambler (Barrett 1933:186-187). An interesting Costanoan Indian story combined elements of native and Christian belief (Gifford and Block 1930:302-303). Fruito, an inveterate gambler, pledged his soul to the captain of the graveyard for a little lucky bond. With its help Fruito won all his opponents' goods. But, after a month, the captain collected his due.

The wagers mentioned in the myths are exceedingly large or fabulous. Dug-from-the-ground, a Hupa supernatural, defeated his adversaries at shinny by means of a

magical stick fashioned from blue stone by his grandmother and won ten strings of dentalium shell money, besides otter furs, foxskins, and blankets (Goddard 1904:149). A Karok tale recounded how two brothers won enough valuable property to fill two houses (Harrington 1932:187). Gambling Boy of the Mohave epic bet his life three times, and lost it on each occasion (Kroeber 1951:78-82). Eyes, even whole tribes, were staked by Maidu mythical gamblers (Powers 1877:298-303; Dixon 1902:58).

Like the Indians who succeeded them, mythical gamblers were not adverse to cheating. The young man from the Yurok village of Pekwon kept the "ace" hovering over his head in a wisp of fog while he played "Indian cards," and, whichever hand his adversary chose, he shot it into the opposite one (Kroeber 1960:236; 1976:402). A Maidu supernatural had a path through his body by which to pass the gambling bones from one hand to the other (Powers 1877:298; Dixon 1902:52). Unfortunately for him, an opponent became aware of what he was doing, closed up the passage by magical means, and opened one in his own body.

Gambling Today

Very few aboriginal games are still played. The disruption of native life, in some instances a very rapid process, led to their decline. In the mission area, the Franciscan padres, who regarded gambling as one of their charges' "dominant vices" (Geiger 1976:105), hastened its demise by deliberate suppression. All Yuki games of change were dropped simultaneously around 1930 when the Pentecostal faith with its taboo against all worldly pleasures took firm hold (Foster 1944:197).

The hand game is the only one that has survived to any degree. Native people in several parts of California still play it, using traditional equipment and singing traditional gambling songs. The Owens Valley Paiute, the Nisenan, and the Cahuilla number among the tribes which still engage in hand game contests (Roberts 1965:19-20; Wilson and Towne 1978:397; Bean 1978:586). In the latter tribe an expert manipulator of the bones still receives considerable admiration.

The urge to gamble did not disappear with the native games. Card-playing soon replaced aboriginal gaming. At the Hupa White Deerskin Dance, for example, card games gradually superseded multiple-stick contests (Goldschmidt and Driver 1940:126). The card games played by present-day Indians are familiar Spanish-Mexican or American ones.

A new development has been the establishment of commercial bingo parlors at several reservations. These tribally-run enterprises aim at attracting players from surrouding towns and cities by offering large cash prizes. Santa Ynez Indian Bingo (the "most exciting game in the state"), which operates seven nights a week, gives $30,000 in a "galaxy of prizes." Undertakings of this sort find no precedent in native California Indian life and culture. The game itself (a lottery), the building of special gaming halls, tribally-organized gambling and dependence on its revenue as an economic base, attempts to lure outsiders, particularly non-Indians, to play,—all these things fall well outside the boundaries of traditional native gambling. Too, in the process of becoming a commercial enterprise, gaming has lost the social and religious habits and customs that once accompanied it.

William J. Wallace
Redondo Beach, California

FOOTNOTES

1. Professional gamblers have been reported for the Clear Lake Pomo (Gifford 1926:329,379).

2. An eyewitness described the Russian River Pomo betting process (Powers 1877:189-190):
"They first divided off into two equal parties and preceded to make up the grand sweepstake. One Indian would lay dawn a half dollar, and another of the opposite section would cover the same. Another would deposit a blanket or a pair of trousers, and one of the other side would match it with an article agreed to be of equal value. A squaw would contribute a dress, a chemise, or a string of beads, which would be covered as above, and so on until they deemed the stake large enough to be worth their while. It consisted of $8. in silver coin, a large hatfull of strings of shell money, and an immense heap of clothing and blankets, some of them new and very good, and it was worth at least $150."

3. A few board games were taken over and modified by California Indians. On the Tule River reservation. Yokuts played "Indian checkers" with 24 clay pieces, 12 black and 12 red, moved over a flat stone inscribed with a rectinlinear pattern; a game with pegs inserted in holes at the intersections of lines scratched on a flat board was played by the Northfork Mono (Culin 1907:796).

4. In 1915 an ingenious Achomawi had a white man in Redding make him a pair of bones in two sections with a screw in the middle. By unscrewing them a little, he could show a black mark on either one, or vice versa. The deception was detected at the Fourth of July game and a fight was prevented by the sheriff, who happened to be present when the opponents of the dishonest gamster seized the $160 pot (Curtis 1924:13:145-146 n.).

5. Snail shells filled with tar may also have been employed (Priestley 1937:75).

14. HOPPER DECLARATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (TX)

CABAZON BAND OF MISSION INDIANS, A
Federally Recognized Indian Tribe,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants,

AND

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

COUNTY OF RIVERSIDE; STATE OF CALIFORNIA,

Defendants.

DECLARATION BY PATRICK H. HOPPER

I, PATRICK H. HOPPER, declare and affirm under penalty of perjury that the foregoing is true and correct:

1. I am a Special Agent for the California Bureau of Investigation and have held that position for 11-1/2 years. In that capacity I have undertaken an investigation of bingo gambling operations by California Indian tribes. My investigation has included a study of the bingo operations currently run by the Cabazon Indian Tribe, as well as those run by other California tribes.

CABAZON BINGO PALACE

2. On Monday, March 19, 1984, I went to the CABAZON BINGO PALACE, 84-245 Indio Springs Avenue, Indio, telephone (619) 342-5600. The BINGO PALACE is located off I-10 at Indio Center Drive, on the east end of INDIO.

3. The BINGO PALACE is a rectangular warehouse-like building estimated at 110 feet wide and 140 feet long; only 3 exit doors were noted. About 25 feet of the right end of the building is taken up with restrooms, food concession and an office. Over these rooms

is a 3-windowed security observation area overlooking the bingo floor. The BINGO PALACE sits on the right side of a dimly lighted, dusty, gravel parking lot. Also sharing the parking lot is a contract Post Office and the CABAZONS' POKER CASINO and Cocktail Lounge.

4. There are two ticket booths at the double glass door add on entrance. The ticket booth directly in front of the door is "L" shaped and the one on the right is rectangular. Passing the ticket booths and turning right is the bingo playing area. The raised stage is directly across the building from the entrance. There are bingo game boards on all 4 walls. On each end wall is a TV Monitor and on the caller's wall is the game diagram board. Also, behind the caller is the pre-pulled Bonanza Bingo board. Signs also stated the size of the do-it-yourself and Bonanza Jackpots.

5. Sitting in front of the caller's stage was a 1984 Dodge D-50 pickup and an ATC (all terrain cycle), another ATC stood up to the left of the caller. A brochure stated a 17' Sylvan Bass Boat with a 25 HP electric motor and trailer valued at $6,771.00 was another prize. The pickup had to go on March 22, 23, or 24 and the boat on March 29, 30 or 31. Prior to the start of the evenings' bingo games, the names of 2 players were pulled from the admission ticket box and they sat on the stage with the caller and were given orange or double cards. Four other players whose names were drawn were given orange cards too. Free coffee was available from urns in the corner near the office.

6. Other than the signs on the BINGO PALACE itself that can be seen in passing on I-10, only a single sign, located on Dillon Road, was seen advertising the bingo games. However, the BINGO PALACE and INDIAN CASINO are being advertised by brochures left in local motel rooms. These materials and others advertising the games are attached hereto as Exhibit "A."

7. In attendance for the Monday evening bingo session were about 300 players. They were seated at some 96 tables in 16 rows of 3 tables on either side of the middle aisle. An average of 8 players were on each half row. On row 5, on the front left side were a middle-aged latin couple, who were later joined by two young latin males. These men had to have the game explained to them. The middle table was shared with a senior citizen couple. The aisle table had 2 elderly women, 1 in a wheelchair, and a middle-aged woman.

8. A goodly portion of the crowd were retired age to senior citizens. Only 6 to 10 blacks were observed. Latins made up an estimated 15 percent of the players; no Orientals were observed. The rest of the crowd was white. At the start of the game it was announced: "You have to be 18 years of age to play." The regular prize or "Blue" package was $18.00. The serialized blue package consisted of an attendance prize ticket; 2 Early Birds, 2 paper cards of 3 games each (6 games total); 4 hard cards of 3 games each (12 games total); 2 super jackpots; 2 paper cards and 2 late game cards, each with 2 games apiece. Available at $1.00 each were the Bonanza Cards. The double prize orange package was $28.00 and the triple prize green was $38.00.

9. Pull tabs were sold from a booth on the left end of the building. The $.50 Super Nevada Club had $1.00-$5.00-$10.00-$25.00 and $100.00 winners for cherrys, lemons, oranges, bells and bars. The $.25 Deluxe B-I-N-G-O pay-off consisted of: $.50 green, $2.00 gold, $5.00 blue, $10.00 grey to $50.00 red. The $1.00 Diamond Cherry Bell pay-off consisted of: $1.00 lemons, $2.00 cherrys, $10.00 plums, $25.00 oranges, $50.00 bells, $100.00 gold bars and $200.00 diamonds. All the cards and pull tabs are "serialized." The pull tabs also had a statement, "For sale or use only in a Bingo Game authorized under California Law and Pursuant to Local Ordinance." Pull tabs obtained from the Cabazon Bingo Palace together with bingo game cards are also included herewith in Exhibit "A."

10. At 1845 hours the 4 warm-up games with jockpots of $20.00 started. These special games were $.50 for a book of 5 paper cards, 3 games each. At 1915 hours the evening bingo began. There were 5 games of Early Bird with a $200.00 jackpot played on paper cards, then the 10 games on the hard cards. The regular games all paid $150.00. The super jackpot of $750.00 consisted of 4 games. After intermission, there were 5 more games of regular bingo with $150.00 jackpots each.

11. The do-it-yourself jackpot of $2,250.00 was not won with 20 drawn numbers, so it continued on for consolation prizes of $300.00 and $100.00. The late game special of 3 games paid $200.00. The Bonanza Bingo sold as a separate card for $1.00 and had a $6,300.00 jackpot. There was no winner at the end of the pre-pulled and pulled 48th number. Consolation prizes of $150.00 and $100.00 were awarded.

12. The Early Bird games were regular and 4 corner, double bingo, letter X, full round robin (outside numbers) and full card or blackout. The super jackpots were regular/4 corner, letter X, small round robin (numbers around free square) and full card. The late game special after the regular game was double bingo and letter X. All the paper cards are serialized, and checked with the verification of the Bingo. In one game the serial number was questioned, but allowed due to quality of printing on the paper cards.

13. The caller for most of the game was a young black male. A female, possibly Indian, and one of the 3 female runners relieved him. Two of the females wore red "BINGO PALACE" T-shirts and the 3rd, a yellow one. The T-shirts were also for sale. An older white male sold the pull tabs. Two young whites were observed in the food service area. Three armed security guards were observed. A young blond, white male in a tan uniform remained on the floor near the office. Two Latin/Indian males in dark blue WACKENHUT uniforms floated, sold tickets and were observed in the security window area. No management "TYPES" were observed.

14. The great majority of the players at the Cabazon Bingo Palace appeared to be non-Indian. Of 300 players about 82 percent were white, 15 percent were Latin or Indian and 3 percent were black.

BARONA INDIAN BONUS BINGO

15. On Monday, March 26, 1984, I attended the BARONA INDIAN BONUS Bingo Games at 1095 Wildcat Canyon Road, Lakeside, telephone (619) 443, 1592.

The Barona Indian Bonus Bingo, billed as "the friendliest bingo in California" is held in the Barona Education Center, approximately 12 miles or 20 minutes north of I-8. The Baronas' are building a new 2,000 seat $2.5 million Bingo Hall at a nearby location. A photograph and a notation stated the slab has been poured and they were working on the walls. The lighted parking lot of the Barona Education Center is half paved and half dirt. Six Barona Indian Bingo Buses were parked on the right side of the parking lot. Entry into the building is through an enclosed porch. On both sides near the double doors are ticket booths fronting the 800-seat bingo playing area.

16. The main playing area is below the caller but on either side of the entrance way are little alcoves, playing areas "A" and "B." To the right or stage area was an area called the "King and Queen" for special bingo players, either chosen by drawing or previous jackpot winners. On the left behind a windowed partition was the "No-Smoking" area.

17. The caller cat on a balcony 12 to 16 fet above the players, opposite the entrance. Game and diagram boards plus TV monitors were on each wall and the caller's wall. Two game and diagram boards plus TV monitors were also in the no-smoking area. A game board for the pre-pulled "Bonanza Blackout" game was above the ticket booth/entrance. The main playing area had 10 rows of 6 tables each with 6 chairs; the no-smoking area had 19 tables. The number of tables with alcoves is unknown. The 6-8 exit doors were painted orange and clearly marked. Above the No-Smoking room was a room with windows, which could be used as a security

observation point to watch the main floor/alcoves. The "free" coffee table and food service area was in the left rear corner. An office was in the right front corner. The crowd was estimated at 650-700 mostly middle-aged to senior citizens. There were very few people in their 20's and early 30's. About 60-80 Indian-Latin-Oriental and 15-20 blacks were observed in the crowd.

18. A middle-aged Japanese lady in the No-Smoking Area, who was playing 9 sets, or 36 games, stated she had won a car last week, but had taken cash rather than the compact car. The "Monday New Car Night Games Rules" state:

> "There will be 21 keys concealed in envelopes. One of these keys will start the new car parked at the entrance. Player who wins the right key, drives the new car home. Main winner of each 15 bingo games picks one key. At the end of game 15, keys will be tried by the 15 winners. If one of these 15 keys starts the car, winner will drive the car home.

The door prize drawing is held after the 15 keys are tried. One door prize per player, if the car is won. The door prize is $300.00.

19. If the car is not won on the first 15 keys: the door prize is one of remaining six keys, MINI-Series will then be ~~played~~ for the remaining 5 keys. MINI-Series cost $5.00 per pack of 5 (3 cards per sheet). "New Car Must Go Every Monday Night, Multiple Winners: If more than one player bingos, winners will spin the wheel: highest numbers spun is winner of key."

20. The car key envelopes are slid down from the caller's balcony on a wire to the ticket booth area. After

the game a large majority of the crowd remained until one of the 15 bingo winners had won the car.

21. Pull tabs were sold from a booth on the main floor between the alcove and No-Smoking area. The serialized $.25 "Nevada Club," and "Red Hot 7's" paid $.50 to $50.00 while the "CRISS-CROSS" paid $.50 to $25.00. The $2.00 "BARONA INDIAN BINGO" paid $2.00 to $1,000.00. The Nevada Club and Red Hot 7's had the California Bear Flag emblem and the notation: "For Sale or Use only in Bingo Game authorized under California Law and pursuant to local ordinance." The Criss-Cross just had the notation. The Barona Indian Bingo pull tab had no notation or emblem. Several types of pull tabs ranging from $.25 to $2.00 were purchased. A $.25 Criss-Cross had a $25.00 diagonal Bar-Bar-Crown Jackpot. The $25.00 winnings, a $20.00 and a $5.00 bill are being held in the D.O.J. vault safe as evidence. These materials together with bingo game cards and literature advertising the games are attached hereto as Exhibit "B."

22. A couple sitting on the aisle next to the window in the No-Smoking room were buying pull tabs by the hands full. On three occasions they purchased $20.00 worth of $.25 pull tabs. Their winnings are unknown.

23. The staff appeared to consist of an equal number of whites and Indians. A white middle-aged, grey haired man with glasses and a young white executive-type who was meeting the employees was observed. Several other whites who seemed to have defined duties were also observed. The "caller's" duties were shared by a young white and an Indian.

24. Four "runners" wearing red aprons were on the floor, 2 were Indian women and one, a male Indian, "Tiny," plus a young blonde female. Another blond female in a yellow apron was seen pushing a coffee serving table and a young male Indian was taking orders for soft drinks. Six to 8 armed uniformed security guards were in and about the hall. A young Indian and "Butch," an overweight middle-aged grey haired Indian mingled among the crowd. On their chest was a small sign "WARRIOR SECURITY"? and a yellow shield was on their left shoulder. All the guards had gold 6-pointed stars. The parking and traffic controllers were seldom inside.

25. The Barona Tribe offers extensive bus service to their games. The cream colored BARONA INDIAN BINGO bus for the beach area/North Park costs $6.00 with reserved seating for bus patrons. The bus leaves Pacific Beach at 10:35 a.m./5:40 p.m. for the 1:00 p.m./6:30 p.m. games. The evening bingo starts at 7:00 p.m. except on Monday when play begins at 6:00 p.m.

26. In the lobby near the ticket booths were boxes with the bingo programs and bus schedules. Also there was a pamphlet entitled: "INDIAN BINGO HELPS INDIAN NATIONS HELP THEMSELVES—PLEASE HELP KEEP INDIAN BINGO ALIVE". The pamphlet tells how bingo is benefitting the Indians through employment, health, education and public works. It also solicits letters to the California Legislature to vote NO on Assembly Bill 2680.

27. The $15.00 Monday Evening Barona Indian Bonus Bingo Package consists of 15 serialized paper

sheets of 4 games each. A second pack costs $13.00 and 3rd or more $10.00 each. There is also a double payoff package for $30.00. The Bonanza Blackout Specials are an extra $2.00 each. On Tuesday through Sunday evening bingo uses both paper and hard cards. They also have Bonanza Blackout and Do-It-Yourself Games.

28. Matinee games start at 1300 hours Tuesday through Sunday. Evening games start at 1900 hours, except Monday, it's 1800 hours. The Monday night games were double and triple bingo, letters T-H-L-X, big and little picture frame, etc., plus blackout jackpots ranged from $50.00 — $75.00 — $200.00 — $250.00 — $300.00. The Progressive Bonanza minimum $10,000 jackpot paid $500.00 as a consolation prize. A new car is won every Monday night.

29. The great majority of the players at the Barona Bingo games appeared to be non-Indians. Of 650 to 700 players 88 percent were white, 10 percent were Latin or Indian and 2 percent were black.

SYCUAN BINGO PALACE

30. On Wednesday, March 14, 1984, I, accompanied by Barbara A. Hopper and Rita Eichenberger, both Department of Justice employees, went to the SYCUAN BINGO PALACE, located at 5469 Dehesa Road, El Cajon, California, telephone (619) 445-6002.

31. We arrived about 1920 hours, during the "Early Bird" game which began at 1915 hours. At the door/booth, with state funds, we each purchased the $15.00 "regular prize package," a "double prize pack-

age'' was available for $25.00. Extra cards and specials were sold during the night for $1.00 each, also ''pull tabs'' at $.25 each 4/$1.00 were being sold by ''runners.'' Each serialized ''Irish Sweepstakes'' pull tab had 5 tabs, instant payoffs ranged from: $.50 3 shamrocks, $1.00 rainbows; $5.00 leprechauns; $10.00 Pot-o-Gold; to $50.00 thoroughbred. The $15.00 regular prize package consisted of 4 hard card game boards of 4 games each (16 games); 3 paper games of 3 games each (9 games); 1 Bonanza bingo card; 1 do-it-yourself card and 1 admission/automobile drawing prize ticket. The double prize package was the same except it was a different color. All the package games were serialized and these serial numbers were checked as part of the payoff procedure.

The Sycuan Bingo Palace is a $1 million dollar warehouse-like building that will accommodate 1,350 high-stake bingo players. The bingo palace, a one-story high ceiling rectangular building, sits ½ mile south of Dehesa Road near the CDF firestation. The paved, lighted, parking lot appears sufficient to accommodate the warehouse's seating capacity. Approaching the double glass doors, one passes three automobiles which are for the Sunday and Monday prize drawings. Inside each door is a ticket booth where the bingo packages are sold. Behind the ticket booth is another booth, where a tub of plastic markers/chips are sold for $1.75. Various colored dobber pens used to mark paper cards are $.75 each. Our purchase was $4.00 for one tub of yellow markers and one each red, green and purple dobber pens. The callers stage was opposite the door and held five persons. Two older Indian women and an older white man all appeared to be doing clerical

duties. Next in line was a young man who appeared to assist the caller who sat at the end of the stage, at the microphone. There were 4 large game boards on the side walls with a TV monitor in each of the four corners. On the end wall was the pre-pulled Bonanza game board. In addition, there were large informational signs about the various games. Formica tables with fixed plastic chairs filled the room row on row, with an aisle down the center.

33. Monitors wearing tan slipover aprons patrolled their aisles to sell additional cards, and to verify bingos. Runners in green slipover aprons circulated selling "pull tabs" and additional games. Also circulating were blue-aproned food service workers. Four armed, uniformed guards were observed during the evening near the doors.

34. The crowd, an estimated 700-800 were adults of all ages. The ethnic makeup was about 80 percent white; 15 percent Latin or Indian; 5 percent Oriental and 1 percent black. About 2/3 of the monitors, most of the runners and food service workers and armed security guards observed appeared to be Indian or Latin. The booth attendants were elderly white women. The Wednesday night "Hot Shot Jackpot" game started with a warmup session at 1845 hours, and the three-hour regular sessions ran from 1915 to 2215 hours.

35. We found seating in the smoking section, under the front right game board. The No-Smoking sections are located on the extreme ends of the building near the restrooms. On either side of us were a young white couple and two black males. Both helped explain how the games were played and what to do next. One young black male, who was playing double cards while buying extra cards

and pull tabs, stated he usually did not spend $60 to $75, as he was then doing, but he had recently won a $6,000 jackpot. In addition to playing his own cards, he watched over our boards and his friends' boards as well.

36. The games were conducted in a quiet professional manner. The numbers were clearly called and then shown on the TV monitors. As the number was called, either it or the next number to be called was exhibited to the room.

37. The 7 regular bingo (hard cards) jackpots were $200 each. The Middle Games Special had 4 payoffs of $100 through $400. Games 8 through 15 were regular bingo games again with $200 jackpots. The Late Game Special (a pink-edged paper game) had payoffs of $100 progressing to $500. All payoffs mentioned are maximum payoffs per game shared among all who bingo at that time.

38. The $10,000 Bonanza Bingo was played from a pre-pulled drawing which the players filled in on their Bonanza cards. If there was no winner on the 48th number the jackpot decreased $2,000. Each additional number was pulled descending to a $1,000 payoff. Some time before the 15th game, the top or original half of the do-it-yourself game must be deposited in locked boxes on the main aisle. Each player writes in any 8 numbers of their own choice on the card. If a player's 8 numbers are blacked out within the first 20 or less numbers called, he wins $10,000. Otherwise, the first consolation prize it $1,000 with a further drawing for the $250 second consolation prize.

39. The last game is for the $1,500 jackpot. It starts off with straightline or 4 corners bingo at $50 and prog-

resses to $150 inside picture frame, $300 outside picture frame and $1,000 blackout. After the regular session ends, at about 2215 hours, there is a late night session from 2230 to 2330 hours of 8 games. The cost to play is unknown. There are various "free-bees" and discounts given out for senior citizens.

40. Rita Eichelberger won a $100 bingo (½ of a $200 jackpot) during the 2nd regular (hard board) game, (probably the 12th game of the evening). When her bingo was declared, a monitor picked up her card and admission ticket. They were taken to the middle of the room, about the center aisle, where both the bingo card's serial number and the bingo were verified with the caller's stand. Ms. Eichelberger's card and ticket were then returned and a few minutes later she was paid off. The $100 prize consisted of 4—$20, 1—$10 and 2—$5 bills paper clipped together. The $100 was seized as evidence after the game, receipted and placed into evidence in the D.O.J. vault safe.

41. The great majority of players at the Sycuan games were non-Indians. Bingo cards, pull tabs and literature advertising the Sycuan games is attached hereto as Exhibit "C."

RINCON ROUNDUP

42. On Friday, March 23, 1984, I attended the RINCON ROUNDUP Bingo games in the 33700 block of Valley Center Road in the Pauma Valley, 16 miles north of Escondidio, California, telephone (619) 749-7557. The bingo games which opened on March 10, 1984, are being held in a 1000 seat two-pole tent until the 20,000 square foot 800-1000 seat high-stakes bingo hall is completed in May.

43. The two-pole tent holds an estimated 125 tables with 8 chairs each in 15 rows and can accommodate 1,000 players. Heating in the chilly big top was 4 heaters on each tent center pole, and a sparingly used space heater in one corner of the tent. Lighting from the overhead string of lights was adequate. There were game and diagram boards and TV monitors in the middle of each wall. The caller sat on a small platform to the right of the entrance. On the left wall was a booth from which the playoffs were made. There were 4 pull tab booths, the $1.00, $200.00 payoff Cherry Bell Special were sold at a booth to the left of the entrance and the right center pole booth. The $3.00, $750.00 payoff High Roller Special was sold at the left center pole booth. The $4.00 pull tab booth on the entrance wall beyond the caller was closed when observed.

44. The staff were all Indian, except one white management type. There were 6-8 female runners in white T-shirts and red baseball hats. Later, red wind-breakers were also worn. Three male maintenance men in gray clothing were also on the floor. "The Hot Corner" payoff booth was manned by 5 women. A uniformed female tribal guard stood against the booth when not selling $1.00 pull tabs by the entrance. The caller was a blonde female, probably Indian. Two females sold the $20.00 bingo packages from the trailer opposite the tent entrance. A commercial catering truck was parked near the entrance with food and refreshments. Eight portable toilets were near the entrance; 4 large and 2 small for women and 2 small for men.

45. The entire parking lot, including the tent floor is paved. A uniformed security guard was in the parking lot. No armed security guards were observed.

46. The Rincon Roundup bingo game is a high-roller operation. All 10 games of the regular bingo session are $500.00 jackpots. The 3 specials: Rincon Special, Progressive and Lucky 8—U pick 'Em, are $5,000.00 packpots. All the regular games were "gimmick" games of double and triple bingo; letters, kit, stamp and line and etc. No regular/4 corners. The female caller enterspersed the number calling with "buy your extra cards now for the upcoming $100,000.00 bingo game." She also solicited contact people and drivers to bring in out of area players.

47. In addition, two males, one white and one Indian, made announcements on the microphone between games giving the "Bingo-Under-the-Big-Top" a "midway carnival" effect. The small crowd, consisting of 150 to 200 people, was noisy in response to these messages. The $20.00 regular session package consisted of 10 serialized color coded paper sheets of 6 games each. The sheets are confusing to a novice as there is both a number and word free in the center space. The extra card for game 6, the Triple Reno (wild ##) purchased from a runner was unserialized, but like all the game sheets, had a game number. The extra game cards were all $2.00 apiece.

48. The serialized pull tabs in addition to the notation, "For sale or use only in a bingo game authorized under California Law and pursuant to Local Ordinance," had an emblem of the State Bear Flag. The jackpots ranged from $1.00 lemons, $2.00 cherrys, $10.00 plums, $25.00 oranges, $50.00 bells, $100.00 gold bars to $200.00 diamonds. The $1.00 lemon had the word "WIN" overlay in green over the 3 lemon jackpot and another pull tab was given as payoff for the winner. Pull tabs, game cards, and a list of "bus contacts" are here attached as Exhibit "D."

49. The 3rd table had 2 Latin female players. Tables 1 and 2 on the aisle had 8 players who won at least two jackpots. During the evening a "caller" from the Sycuan Bingo Palace was acknowledged as being from the 2nd best bingo game in the county.

50. Persons interested in "making money" were asked to contact the "Hot Corner." In addition, a "for bus service contact person in your area" handout was left for each set of players. These contact people ranged from local residents to residents of Banning, Hemet, Coachella, San Pedro, Fountain Valley, military camps, and Burbank.

51. Most of the games were paced with an electronic beep timer, however, during game 6, it was not used and the pace was raised until the crowd yelled for it to slow down.

52. The great majority of players at the Rincon games were non-Indians. Of 150 to 200 players 87 percent were white, 12 percent were Latin or Indian and 1 percent were black.

QUECHAN INDIAN BINGO

53. On Sunday, March 18, 1984, I attended the QUECHAN BINGO GAME in Winterhaven. The bingo games are held in the QUECHAN Community Center Gym which is located on Picachio Road (S-24) and San Paschal School Road, about one mile outside Winterhaven on the Quechan Indian Reservation. A call to Quechan Indian Bingo, (619) 572-0678, advised the bingo games started at 1345 hours (matinee) and 1845 hours (evening). However, this was in error as the matinee games start at 1300 hours and the "ATC (All Terrain

Cycle) Special Night'' begins at 1830 hours. Warm-up games are played as the crowd settles down. The evening advanced sales with savings on bingo packages ends at 1600 hours.

54. The Quechan Community Center Gym is typical of that of a small rural school. Entrance into the gym is through several double doors into a foyer. On the right side of the foyer is a food concession area and on the left, the restrooms. There are double doors on either side of a glass trophy display case which lead into the gym. The wooden floor is marked off for basketball, the wooden bleachers were folded against the side walls and the backboard nets were raised to the ceiling. Opposite the main entrance is a raised stage. The caller sat alone on the stage; to his left was a gameboard and play diagram board. On each side wall in the center of the gym were game boards, diagram boards and TV monitors. There was also a TV monitor on the stage. The TV camera used by the caller to show the numbers was also used by the runner to verify bingos.

55. Sitting on the stage were household items like clocks, mirrors, ice chests, etc. These prizes, in addition to a 3-wheel ATC were awarded by a name draw. Place cards referred to ''Monster'' matinee and evening jackpots. Also a progressive bingo of 50 numbers for a $1,300.00 jackpot was advertised.

56. An estimated 225-250 players were at the 55 folding tables and chairs. The greater majority of the bingo players were senior citizens—retirees and ''snow birds'' (i.e., persons who travel south to avoid cold northern climates). The vehicles in the lighted gravel

parking lot were mostly Arizona or out of state and the numbers indicated car pooling. An estimated 10 to 15 percent of the players appeared to be Latin or Indian. Only 4 blacks were observed and no Orientals were observed.

57. The Quechan Bingo Game appears to be an all Indian operation consisting of a caller, 4 runners, 3 young boys, and a middle-aged woman. Jackpot payoffs were made by the runners from a woman in an office near the stage; all jackpots over $1,000 are made by check. Three armed uniformed Tribal Police were in and about the gym. An un-uniformed supervisor carrying a radio was also observed. The kitchen sold fast foods and refreshments. Coffee was sold from a cart on the floor.

58. A $16.00 package of serialized all paper games was purchased at the booth located on the left corner of the gym. However, this late purchase package had to be supplemented by additional cards at $1.00 each, which were included in the advanced sales package. The super $.50 Nevada Club pull tabs had instant $1.00 to $100.00 payoffs for 3 cherrys, lemons, oranges, bells and bars. The serialized pull tabs have the notation: "For Sale or Use Only in a Bingo Game authorized under California Law and pursuant to local ordinance." Game cards, pull tabs and literature on the Quechan Tribe are here attached as Exhibit "E."

59. Most of the Jackpots were $100.00. The "LUCKY7" however paid $150.00 and the "KITE," $200.00. The early warm-up mini and the mini-bingo only paid $50.00. The 60-40 double bingo jackpot was $325.00 and the super jackpot full card jackpot was raised from

$500.00 to $600.00. The latebird finale "Super Blackout" full card jackpot was $1,500.00.

60. A woman who became ill during the game was carried to the office area. The caller's announcement that she was fine as the ambulance siren was leaving only brought a slight murmur from the crowd and the games went on.

61. The great majority of players at the Quechan games were non-Indians. Of 225 to 250 players about 83 to 88 percent were white, 10 to 15 percent were Latin or Indian and 2 percent were black.

BINGO BY THE BISHOP INDIAN TRIBE-
Inyo County

62. On March 15, 1984, by telephone, I spoke to Detective Kassemos of the Inyo County Sheriff's Department and he informed me that the Bishop Tribe of Pauite Shoshone Indians were conducting large-stakes bingo just west of the city of Bishop. Detective Kassemos related the tribe was offering $1,000 jackpots in their games conducted on Wednesdays and Fridays. The games have been conducted for about 2 years and they are advertised through the use of radio spots and by billboards on U.S. Highway 395. The tribe's clientele consists of local non-Indian residents and Indian tribal members. The attendance at the games has been increasing. Detective Kassemos stated it was believed the tribe largely conducted the games but may be linked to the Pan-American Amusement Management Company of Tampa, Florida.

SOUTHGATE BINGO PALACE
San Rosa Rancheria, Kings County

63. On March 14, 1984, by telephone, I spoke to Deputy Nick Camarillo of the Kings County Sheriff's Department. He informed me that the Santa Rosa Rancheria has been conducting large-stakes bingo games since September of 1983. The games are run by the Paland Management Company of Dallas, Texas, and the Indians run a food concession serving the bingo games. The games are being conducted at the rancheria which is located 5 miles south of Lemoore.

64. The games are played in a hall seating 1,180 people and the games draw 480 non-Indians and Indians nightly. Admission to the games is $50 and $100 and jackpots are offered from $150 to $47,000. Pull tabs with payoffs from $100 to $1,000 are also offered. Various other merchandise prizes are also awarded. The games are offered from 5 to 7 days a week.

SANTA YNEZ-CHUMASH TRIBAL BINGO
Santa Barbara County

65. On March 29, 1984, by telephone I spoke to Deputy Bill Caldwell of the Special Investigations Unit of the Santa Barbara Sheriff's Department. He informed me that the Chumash Tribe of the Santa Ynez Reservation had been conducting large-stake bingo games since August of 1983. The games are run by the "Associates Management Company" from Santa Ana and the games are played on the reservation which is located 2 miles east of Solvang on Highway 246. The tribe began the bingo games in a tent but have since built a 29,000 square

foot building which houses 1,500 players. The games are offered on Friday, Saturday and Sunday and $1,000 jackpots are offered with a guaranteed $65,000 payoff. Pull tabs are also offered and the tribe gives free bus services from Los Angeles, San Francisco and Sacramento. The games are adversised in San Francisco, Los Angeles, and Bay Area newspapers. Under the management agreement, the tribe receives 51 percent of the profits and the management company receives 49 percent of the profits. The average profits from these games on given days are as follows: Fridays, $15,000; Saturdays, $85,000; Sunday $30,000. It was estimated that the average player spends about $84 per session.

JACKSON BINGO PALACE
Amador County

66. By telephone on March 14, 1984, I spoke to Deputy Greg Berkfeld of the Amador County Sheriff's Office. He informed me that the Mi-Wok Tribe of the Jackson Rancheria had announced intentions to begin large-stakes bingo. The games will be played on the reservation which is located 5 miles northeast of Jackson on New York Ranch Road. The tribe has entered into an agreement with Golden Empire Limited Management Company out of Fresno and have begun building a 20,000 square foot bingo hall. The hall will seat 1,200 players and the tribe intends to offer bingo games 4 days a week, Thursdays through Sundays. The tribe intends to offer $10,000 pots and progressive jackpots of much more. Pull tabs will also be offered.

67. The population on the rancheria consists of 20-25 Indians and the tribe announced its intentions to

provide bus service from Sacramento and the Bay Area to the games.

BINGO by the San Manuel Indian Tribe
San Bernardino County

68. By telephone on March 16, 1984, I spoke to Sergeant Fisher of the San Bernardino Sheriff's Department. He informed me that the Serrano Tribe of the San Manuel Reservation had been negotiating with various management companies to begin large-stakes bingo games on their reservation. He indicated the tribe continues negotiations and intends to begin bingo games.

BINGO GAMES by the Saboba Tribe
Riverside County

69. Through newspaper accounts, I became aware on March 26, 1984, that the Saboba Tribe of Riverside County voted on March 25, 1984, to allow bingo games on their reservation.

Under the penalty of perjury, I hereby declare that the above statements are true and correct.

Executed on June 22, 1984, at San Diego, California.

/s/ Patrick H. Hopper

15. RICHARD TESTIMONY

DEPARTMENT OF JUSTICE

Testimony
by
Mark M. Richard
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice
before the
Committee on Interior and Insular Affairs
House of Representatives
Concerning
H.R. 4566

(Indian Gambling Control Act)

June 19, 1984

Mr. Chairman and Members of the Committee:

My name is Mark M. Richard. I am a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice.

It is a pleasure for me to appear before this Committee to give the Department's position on H.R. 4566, the Indian Gambling Control Act.

This bill, which you have introduced Mr. Chairman, addresses an aspect of Indian affairs and law enforcement concern that has only recently assumed significance. That problem is the widespread development of major gambling operations on Indian reservations scattered throughout the United States. The Department of Interior has estimated that nearly 80 tribes are conducting gambling operations, chiefly bingo, and that 20 to 25 of these are "high stakes" operations, some grossing up to $1 million monthly. Some of these operations are tribally controlled and operated, others involve outside management companies,

while still others are independently operated by individual Indian residents.

The sudden growth of these operations has generated concern in the law enforcement community. The Department has been made aware of the concerns of United States Attorneys, State Attorneys General and District Attorneys and other law enforcement officials. The basis of the concern is the attraction that all lucrative gambling operations will have for organized criminal elements. The large amounts of cash act as a magnet and a source of potential corruption. Let me mention also that our concerns at this time are oriented toward prevention of future problems and are based on our past experience going back several decades in dealing with organized crime.

Many states are now permitting gambling. Where stakes are high, the states have generally kept the operations in their own hands or subjected them to the control of powerful gaming commissions; where private parties (such as local charities) are allowed to operate gambling, there is generally strict licensing coupled with severe limitations on times of operations and prizes. In either case, state control hopefully fends off criminal influence by direct government operation or by minimizing the amount of cash in play. In the area of Indian gambling neither state nor federal law enforcement operates as an effective deterrent because of the complex network of reservation criminal law enforcement.

The attraction that high stakes gambling has for criminal elements should be readily apparent to this Committee. It involves a large number of fast moving cash transactions. The opportunities for "skimming" and "laundering" are enormous. Employees and managers can be corrupted into dishonest manipulations. Large-

scale gambling operations require significant support services, such as security, food, cleaning, sanitation and transportation. Every one of these fringe operations can be lucrative and can attract racketeers who preserve their competitive edge by violence and intimidation. This has been the experience of legal gambling elsewhere. It has necessiated the creation of boards and commissions with pervasive supervisory authority, and even that has not always proved effective. If Congress is going to put its stamp of approval on gambling activities, it should safeguard against crime and corruption.

From the point of view of criminal law jurisdiction there are two major types of reservation: Those in which jurisdiction over Indian residents is shared between the federal and tribal governments, and those where all or some jurisdiction is exercised by the state. CF 18 U.S.C. 1151 with 18 U.S.C. 1162 and 18 U.S.C. 3242. On the federal reservations, as on other federal enclaves, state law is often assimilated to fill the gaps in legislation. See 18 U.S.C. 13 and 1152. It has been held in non-gambling situations that on either type of reservation, only state *criminal* law was directly enforceable by the state or assimilated by federal law, and that certain "regulatory" measures of the state though enforceable by criminal penalties, did not qualify as "criminal."

Within the very recent past, some Indian tribes have begun to use this exemption to carry on large-scale gambling operations free of all the licensing requirements and limitations and restrictions imposed generally by state law. The courts have uniformly supported the tribes except in those instances where the tribes engaged in operations that were completely forbidden by state law, and the prohibition was therefore deemed "criminal." Thus, blackjack

will not be legal on a reservation if the only form of gambling allowed in the state is bingo. If legal bingo is allowed only upon a permit issued by the police chief to members of a church or charitable organization, and only for three-hour sessions to be held once a month with a $100 prize limit, the Indians may, in contrast, conduct operations 24 hours a day, daily, with $10,000 prizes and no permit. For example, the Cabazon Band in California, consisting of 25 members, has a hall that seats 700, open 7 nights a week. The Cherokee in North Carolina have had over 3000 players paying $108 a head at their twice a month sessions. The Lac Court Oreilles in Wisconsin charge a $200 entry fee for a chance at jackpots totaling $75,000 each night. The Pawnee of Oklahoma outgrew their 200-seat gym and have built an 800-seat establishment.

This bill, which you have introduced Mr. Chairman, would establish federal standards and regulations for gambling in Indian country. The Department endorses appropriately crafted standards and regulations for gambling activity. Although the Department has reservations about H.R. 4566, the bill suggests a framework for shielding such operations from infiltration by criminal elements, the danger that has caused the Department concern. The proposal also represents an attempt to achieve a compromise between Indian and local interests. It preserves some substantial measure of tribal authority, and recognizes that totally unregulated gambling raises legitimate law enforcement concerns to both the Indians and to persons living in areas surrounding reservations. Finally, the proposal will safeguard a significant source of tribal revenue. By stating a clear congressional policy in accord with those decisions legalizing high stakes gambling, the bill will serve to protect the tribes from the risk of adverse

decisions in other courts of appeals or in the Supreme Court *Cf. Rice v. Rehner*, — U.S. — , 103 S. Ct. 3291 (1983) with e.g., *Barons Group of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 2091 (1983).

We cannot fully endorse the bill as drafted. From a law enforcement perspective it does not go far enough. Our concerns are that the bill simply does not provide for the degree of supervision and auditing to safeguard against "skimming," and "laundering," kickbacks, manipulation and other criminal activity. Although the tribes are recognized as governments, they do not have the authority or resources to police these types of activities. The 25-member Cabazon Band or the 106 member Sioux tribe at Prior Lake, near Minneapolis, cannot adequately deal with the influx of hundreds of players. Even larger tribes that could be said to be analogous to counties, do not have access to subpoena power or state criminal records that are just two of the many prerequisites to effective screening and auditing of a gambling operation. Indian courts do not have jurisdiction over non-Indians who commit offenses on reservations. Altercations, robberies, driving offenses and disorderly conduct will cause problems for local and federal authorities that they are not prepared to deal with.

It is the view of the Department of Justice that there are many problems related to having the Department of the Interior play the role of a supervisory gambling commission. To be reasonably effective as a detergent to the infiltration of corrupt and criminal influences, a regulatory body functioning in the field of gambling must be well staffed with sophisticated auditors and investigators, have readily available compulsory process, be based on or near

the center of the operations and have the power to establish and enforce regulations covering the entire gamut of matters associated with running a gambling operation. Even then, as we have repeatedly seen with respect to well regulated state operations, criminal infiltration still rears its ugly head. The Interior Department is in no position to assume the needed regulatory role, which in many respects would be inconsistent with its mission and function. An alternative mechanism for regulating gambling on Indian reservations must be devised.

While the Department has yet been unable to come up with a satisfactory alternate mechanism for dealing with Indian gambling, we hope, in conjunction with the Department of Interior, to do so in the near future. Beyond developing a satisfactory proposal on that regulatory mechanism, we would like to express some of our concerns with other provisions of H.R. 4566. I will deal with them in the order that they appear in the bill:

Definition of Indian country.

Section 4(3) defines "Indian country" as (a) reservations and (b) lands held by the United States in trust for a tribe or individual or land held by a tribe or individual with a restriction on alienation. This differs significantly from the standard and general definition in 18 U.S.C. § 1151 by omitting "dependent Indian communities". We surmize that the intent of the draftsman was to preclude legalization of gaming in those areas which, while sufficiently Indian in character to warrant federal criminal jurisdiction to the exclusion of the state, were not under tribal governance. We think this a correct decision. However, we are not certain why the same reasoning should not apply to the other buildings and lands in trust or under restriction, that are not within reservation boundaries,

i.e., not in areas in which Indians reside under tribal governance.

Secondly, we fear that the discrepancy in definitions conceals a law enforcement gap, in that it does not specifically and clearly deal with gaming in the "dependent Indian communities" which are subject to exclusive federal criminal jurisdiction, but where there is no federal or assimilable state law making gaming a criminal offense because the state law is deemed merely regulatory.

Thirdly, since the Act apparently is intended to be all-inclusive, reaching not only federally controlled reservations but those in which criminal jurisdiction has been ceded to the States as well (see Section 5), it might be advisable to deal explicitly with those reservations (or areas consisting of allotments held in trust or under restriction on alienation) which were either state created or over which more jurisdiction was ceded to the state than was done under Pub. L. 280 and similar legislation. Examples would be some reservations in eastern states and allotments in the former Indian Territory which has become part of Oklahoma. While such specific tratment may not be necessary — since *Penobscot Nation v. Stilphen*, — U.S. — , 104 S. Ct. 323, 52 USLW 3330 (No. 83-336, Oct. 31, 1983), a recent Supreme Court decision, rejecting jurisdiction of a Maine Indian suit to restrain state enforcement of its gambling regulations for want of a substantial federal question, suggests that in such cases state regulatory law is applicable — the will of Congress might best be spelled out rather than left to litigation.

Illegal gaming.

The proposal provides for punishment of unauthorized gaming by tribal as well as federal and state authority. Whether it is intended that tribal authority extend to non-Indian violators should be made clear rather than left to litigation. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the Supreme Court held that in the absence of a declaration there was no jurisdiction, but section 5 is ambiguous.

We assume it is intended that entities such as an American Legion Post or Catholic Church obtain a permit even if most members are non-Indian. It might, however, be advisable to clarify to what extent the non-Indian residents of the reservation require tribal licensing to avoid litigation of the type in *United States v. Mazurie,* 419 U.S. 544 (1975).

It should also be made clear whether and to what extent tribal prosecution will bar subsequent federal or state prosecution for the same conduct. Cf. 18 U.S.C. § 1152, para. 2, cl. 2 (precluding successive prosecution), with *Wheeler v. United States,* 435 U.S. 313 (1978) (holding that successive prosecution is not barred by the Double Jeopardy Clause).

The provision for prosecution of illegal gaming by the states in those instances where jurisdiction has been assumed under special statutes is inadequate becaue it cites only two such Acts, Pub. L. 90-284 and Pub. L. 83-280. There are others, e.g. Pub. L. 80-846 (Iowa), and 18 U.S.C. 3243 (Kansas).

Additionally and most significantly, is the failure of this key provision to provide punishment for gambling that it declares "illegal."

We have a number of other concerns in addition to these mentioned. For example, with respect to management contacts, it is not clear whether the only ground on which a contract may be disapproved is the presence of a convicted felon. Section 7(c). If this is the case, it is inadequate. A very substantial concern of the Department of Justice is the presence of front persons without felony convictions but linkage with organized crime. On the other hand, if it is contemplated that there are other bases on which the contract can be disapproved, they should be outlined or indicated in some fashion.

We are not certain that section 7(a) (ii) requires sufficient information for an adequate background check.

In conclusion, let me say that the Department views this bill as a very important beginning. The Departments of Justice and Interior have been working independently and with one another over a year to come up with a workable solution that should be generally agreeable to all concerned. Both Departments are in general agreement with the objectives of this bill, but both have their reservations and concerns which have not been allayed. I hope that I have conveyed to this Committee a sense of our deep concern lest this well-intended piece of legislation be enacted without necessary safeguards.

16. BEAN DECLARATION

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THE CABAZON BAND OF MISSION INDIANS
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV-83-1117-LEW(Tx)

THE CABAZON BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

CASE NO. CV-83-3073-LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, et al.,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

DECLARATION OF
LOWELL JOHN BEAN
Date: September 24, 1984
Time: 9:00 a.m.
Courtroom: 4

I, LOWELL JOHN BEAN, declare under penalty of perjury as follows:

1. I am a Professor of Anthropology at California State University at Hayward and am competent to make this declaration. If called to testify, I would testify as follows:

2. I earned my A.B., M.A., and Ph.D degrees in authropology from the University of California at Los Angeles.

3. I have worked among California Indians for over twenty-five (25) years.

4. My primary area of research is southern California Indians. I have worked extensively among the Cahuilla, the Serrano, the Chemehevi. the Diegueno, and the Luiseno Indians of southern California. The residents of Morongo Indian Reservation and Cabazon Indian Reservations are

descendants of these cultures. Of these groups, it is the Cahuilla Indians whose culture I have addressed my most intense research attention. I began my research in 1958 among the Cahuilla and resided for a lengthy time at the Morongo Indian Reservation in southern California. Of all the Indian reservations at which I have conducted ethnographic and enthnohistoric research in areas such as economics, politics, religion, organization, Morongo Indian Reservation has received more research attention from myself than any others. I have published a number of books and articles on the Cahuilla and some specifically on the Morongo Indian Reservation and its history of economic development.

I am also a charter trustee and member of the Board of Trustees of Malki Museum at the Morongo Indian Reservation, associate editor of the California Journal of Anthropology, and editor-in-chief of the Ballena Press. A copy of my curriculum vita is attached.

5. I have examined the declaration and report by William Wallace filed by the defendants in this case and conclude that the declaration and report do not adequately describe the nature and role of gambling among the Cahuilla Indians and, in particular, the Morongo, Cabazon, and other reservations with which I am familiar. Based on my many years of research and personal knowledge of the Cahuilla culture, I have prepared a brief overview of Cahuilla gambling and analysis of Dr. Wallace's report and declaration which is attached hereto.

6. Cahuilla Indians of these reservations have engaged in gambling for both public and private benefit, provided time and space under the direction and control

of tribal leaders for gambling purposes, and have encouraged Indians of other tribes and, in historic times, persons of other cultures and races (including Spanish, Mexican, and Anglo-American persons) to participate in gambling endeavors on their reservations.

7. I find it necessary to say that since Dr. Wallace has not intensively researched the Cahuilla peoples, traditionally or historically, nor the social, economic, religious circumstances of the Morongo and Cabazon Reservations, he cannot be considered an expert in this matter.

8. As an anthropologist, I see the presence of the Tribal Bingo enterprises on the Morongo and Cabazon Reservations as being a present day adaptation of the traditional ways of the Cahuilla people, *e.g.* the use of tribal lands for gaming, recreation, and generating an income from gambling and spending by outsiders for the economic benefit of the reservation.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 1984 at Oakland, California.

/s/ Lowell John Bean

A BRIEF OVERVIEW OF CAHUILLA GAMBLING AND AN ANALYSIS OF THE DECLARATION AND REPORT OF WILLIAM J. WALLACE FOR THE COUNTY OF RIVERSIDE AND THE STATE OF CALIFORNIA IN CASES NO. CV 83-3073-LEW AND 83-1117-LEW

I have read the manuscript prepared by my colleague, Dr. William Wallace, entitled "California Indian Gam-

bling''. Dr. Wallace has reviewed some, but by no means all, of the literature contained in ethnographic sources on California Indians. The materials reviewed by Dr. Wallace are inadequate for a thorough understanding of California Indians in general and for the understanding of the nature of gambling among the Cahuilla Indians of southern California at Morongo Indian Reservation and Cabazon Indian Reservation in particular. The California Indian cultures, which include more than 80 separate reservations and rancherias, are widely diverse and not easily subject to such broad generalizations as developed in Wallace's paper. It is clear that Dr. Wallace has not utilized what literature is available regarding these communities. He has not consulted with other experts in the field in order to evaluate the nature of gambling in the subject area. Nor has he, to my personal knowledge, ever engaged in ethnographic field work among these peoples. The data base which he has reviewed is not adequate for making sweeping generalizations about California Indians, especially not the Indians of the Morongo and Cabazon Indian Reservations.

The essay is also inadequate because Dr. Wallace does not consider the nature of gambling as an institution after the time of European contact. Traditional gambling techniques have continued among these peoples from time immemorial until the present. Gambling has at no time in the history of the Cahuilla peoples ceased as a significant activity, including today.

I will proceed to comment on specific points in this essay.

On page 1, paragraph 3, Dr. Wallace notes, ''However, such persons did not form a professional class of gamblers,

for no one gained a full living from the habit." Those Indians of southern California and the Cahuilla Indians in particular whom I have interviewed over my many years of working among the Cahuilla, consider gamblers among their people to be a professional class as persons. These gamblers made a significant part of their living both traditionally and historically because of their skills in gaming. They received an extraordinary amount of money for these activities and, in fact, refused—and still refuse—to engage in gambling without wagers of significant amounts of moneys. For example, I myself am familiar with an instance in the late 1950's or early 1960's in which highly regarded gamblers refused to participate in a game until the amount being wagered was $3,000. I was advised at the time that this was not atypical. Individuals who are in these categories are ranked according to their skills; their reputations are well known; their skills are well known; they are highly thought of and respected in their communities because of their skills. Furthermore, gambling and gamblers receive political and supernatural, or sacred, sanctions from community leaders for these activities. The time and places where gambling was engaged were controlled, sanctified, and protected by traditional leaders of Indian communities, whether at "nukil" or funeral ceremonies, or in later times at fiestas.

It is well known that persons of high rank and status among California Indians served in professional capacities. Among the Cahuilla, the "Net" (Chief) the "Paha" (Chief's assistant), ceremonial singers, shaman-curers, basket makers, traders and others were considered as professional persons. This condition is not at all unique to the Cahuilla. It is found throughout the State of California and

Native Americans in all of the areas in which I have worked, which includes some dozen or so tribes throughout California. Gamblers are generally considered as professional persons as would be political/religious elites or craftsmen.

Wagers were placed and won or lost by individuals, competing team-players and non-players. Wallace says on Page 5, "The village or tribe as such never put a common bet, even if the opponents were outsiders. Nor did the political community or any political authority receive any part of the amount raised. Aside from the small percentage paid to a referee or umpire, the entire sum wagered went to the successful bettor or bettors."

Comment: There is no supporting data for this conclusion. To the contrary, at fiestas among the Cahuilla, exchanges of goods or payments were associated with game playing. When gaming participants would come to Cahuilla ceremonies or fiestas at which they engaged in gambling, a mandatory gift or payment would be given to the political-religious leaders (of the community). During religious and secular fiestas, these same people would be expected to provide gifts, and they would rent space and accomodations from the fiesta coordinators, who were the political and community leaders of these communities. They would also distribute monies throughout the community through purchases of goods while visiting the communities. Consequently, at both sacred ceremonies and fiestas, the sponsoring community did indeed receive monies and/or goods for services provided to visitors or participants who came to gamble, wager or observe gaming. This is particularly evident in the Spanish, Mexican, and early American periods when gambling was done under the sponsorship of fiesta leaders.

Each reservation in southern California had a Saint's Day and a fiesta was generally held every year at that Saint's Day. These fiestas usually lasted about a week. The purpose of these fiestas was commercial, economic, recreational, religious, and social. People were charged for the space they used. People sold things at rented spaces. They sold food materials and crafts. It was expected that the overhead cost of the fiesta would be taken care of by donation and rents and that a profit would be received by the sponsors as well as various other entrepreneurs coming for commercial purposes. Gamblers were among these. After Indians began to deal socially and economically with non-Indians throughout the Spanish, Mexican, and American periods, non-Indians were encouraged to come to these fiestas as participants and customers. Gambling games were played with Indians and non-Indians participating. These included not only the traditional games, but games such as card and dice games and horse races.

The playing of these games is still considered an inherent component to the fiesta system. A fiesta without gambling is not a fiesta.

On page 20, Wallace suggests, "Very few aboriginal games are still played." While it is true that many aboriginal games are not played today, those most associated with gambling and exchange of large amounts of monies between individuals or groups are still played on almost every reservation and Indian community that I know of in California. In particular, these include hand games and peon games. Although many traditional games are not still played, many California Indians, and Cahuillas in particular, that I know from personal experience, engage in non-Indian gambling very frequently. It is a significant recreational function

among Cahuillas. Several Cahuillas that I know have been engaged in a professional capacity at card parlors and the like in the local region.

It should be pointed out that, contrary to the conclusions of William Wallace on page 21 of his report, gambling traditionally and historically has been engaged in as part of tribally-run enterprises. Ceremonies and fiestas were to attract Indian and non-Indian players from many other reservations and communities surrounding the reservations as a means of bringing income to a tribally-sponsored affair. For this purpose, special gaming spaces were provided or built by the sponsoring group, e.g., ramadas. The fiesta, at which gaming was a very significant economic component, was seen as a means of acquiring revenue for the reservation and a part of this was an attempt to attract outsiders, often non-Indians. Wallace's statement that "Undertakings of this sort find no precedent in native California Indian life and culture" is not historically accurate.

Finally, it is necessary to say that, since Dr. Wallace has not intensively researched the Cahuilla peoples, traditionally or historically, nor the social, economic, religious circumstances of the Morongo and Cabazon Reservations, he cannot be considered an expert in this matter. In order to be considered an expert in this field, one would have to demonstrate a familiarity with the literature on the Morongo and Cabazon reservations and the Cahuilla Indians, have worked directly with these Indians, and have reviewed the archival data available on this subject. From the report and declaration which he submitted in this case, it is clear to me that Wallace has not done any of these things which would qualify him professionally to render an expert opin-

ion on this subject as an anthropologist. In addition, Wallace is considered by his peers to be an archaeologist, not an ethnographer or cultural anthropologist.

LOWELL JOHN BEAN
Oakland, California

17. APPROVAL OF MANAGEMENT AGREEMENT

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau Of Indian Affairs
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

CERTIFICATE OF APPROVAL

Pursuant to the Act of March 3, 1891, as amended (16 Stat. 570; 25 U.S.C. 81), and the authority redelegated from the Secretary of the Interior by 209 DM 8 and 10 BIAM 3.1, that Management Agreement dated May 17, 1984 and the Amendment No. 1 thereto dated September 10, 1984, between the MORONGO BAND OF MISSION INDIANS and CBA DEVELOPMENT COMPANY, INC., a California corporation, for the purpose of the establishment and operation of a tribal bingo enterprise on the Morongo Indian Reservation, Riverside County, California, is hereby approved retroactive to May 17, 1984 SUBJECT TO the following condition:

1. This approval by the Secretary of the Interior may be revoked if any parties in interest to CBA shall be found to have a felony conviction or plea of nolo contendere.

ACCEPTANCE of the above condition by the Morongo Band and CBA shall be evidenced by their signatures attached hereto and unless a fully signed copy of this conditional approval is returned to the undersigned Area Director within thirty (30) days of the below date, the within approval shall be deemed null and void.

Date: 9-20-84

/s/ Illegible
Area Director

ACCEPTED:

CBA DEVELOPMENT COMPANY, INC.

/s/ By Illegible

Date: 9-25-84

MORONGO BAND OF MISSION INDIANS

/s/ Robert Martin,
Tribal Chairman

Date: 9/24/84

/s/ Mary Ann Andrea
Business Committee
Member

/s/ Victoria Morris
Business Committee
Member

/s/ Hue F. Verb
Member
Business Committee

Business Committee
Member

/s/ Charles Martin
Business Committee
Member

/s/ Rodney Mattrice
Business Committee
Member

18. KRENZKE DECLARATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV-83-1117-LEW(Tx)

THE CABAZON BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE CALIFORNIA, and BEN CLARK,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervener.

CASE NO. CV-83-3073 (LEW)

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, et al.,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

DECLARATION OF THEODORE KRENZKE, DIRECTOR OF INDIAN SERVICES, BUREAU OF INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, THEODORE KRENZKE, do hereby declare:

1. I am Director of Indian Services, in the Burea of Indian Affairs, United States Department of the Interior. As such, I am familiar with the policies of the Department of the Interior regarding Indian tribal bingo enterprises.

2. It is the Department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of their reservations, and tribal self-determination. All of these are federal goals for tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983. A copy of the President's statement is attached as *Exhibit 1*.

3. We regard the opportunity to establish bingo enterprises as particularly important for tribes which lack revenue-producing natural resources on their reservations and which lack a viable tax base. We recognize that the limitations on federal funding for tribal governments has been the impetus for many tribes to seek alternative sources of the revenue they need in order to provide governmental services to their people. A number of tribes have turned to bingo enterprises to supply that revenue just as many states have instituted state-run lotteries for the same purposes.

4. As the Department charged with the primary responsibility for carrying out the nation's trust obligations toward Indian tribes, we are responsible for protecting tribal resources. We are also concerned with the overall welfare of the tribes and their members. In furtherance of the federal responsibility in this regard, the Deputy Assistant Secretary—Indian Affairs (Operations) has recently issued instructions to the Area Directors of the Bureau of Indian Affairs regarding review and approval of bingo management contracts. A copy of these instructions is attached hereto as *Exhibit 2.*

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.

Executed at Wishington, D.C., on August 28, 1984.

/s/ THEODORE KRENZKE

EXHIBIT 1

* * *

Indian Policy

Statement by the President.
January 24, 1983

This administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign

Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-governmet basis. Throughout our history, despite periods of conflict and shifting natural policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold.

In 1970 President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the Federal Government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, Federal policies have by large (Illegible) the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the Federal Government, and the private sector will all have a role. This administration will take a flexible approach

which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the Federal Goverment.

This administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen Federal control over tribal governmental affairs. This administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the Federal trust responsibility for the physical and financial resources we hold in trust for the tribes and there members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like State and local governments are more aware of the needs and desires of their citizens than is the Federal Government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, Federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions—enforcing tribal

laws, developing and managing tribal resources, providing health and social services, educating children—are frequently still carried on by Federal employees. The Federal Government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This administration pledges to assist tribes in strengthening their governments by removing the Federal impediments to tribal self-government and tribal resource development. Necessary Federal funds will continue to be available. This administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this administration has developed, through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the States consolidated dozens of categorical Federal domestic assistance programs to reduce fragmentation and overlap, elimi-

nate excessive Federal regulation, and provide for more local control. This administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally recognized trfibes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with State and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen, and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U.S.C. 4273) to include a representative of Indian tribal governments. In the interim, before congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian Tribal Governmental Tax Status Act which provides tribal governments with essentially the same treatment under Federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited

policy of terminating the Federal-tribal relationship Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in 11 Con Res 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the Federal Government. A lingering threat of termination has no place in this administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past despite good intentions, the Federal Government has been one of the major obstacles to economic progress. This administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the Federal Government, and the private sector in developing reservation economies.

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed, with unemployment rates among the highest in the country. Indian leaders have told this administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth

have been fragmented and largely ineffective. As a result, involvement of private industry has been limited with only infrequent success. Developing reservation economies offers a special challenge devising investment procedures consistent with the trust status, removing legal barriers which restrict the type of contracts tribes can enter into, and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies, because often there has been no established resource base for community investment and development. Many reservations lack a developed physical intrastructure, including utilities, transportation, and other public services. They also often lack the regulatory, adjudicatory, and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs in manufacturing, agribusiness, and modern technology, as well as fishing, livestock, arts and crafts, and other traditional livelihoods.

Natural resources such as timber, fishing, and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The Federal Government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the Nation stand to gain from the prudent development and management of the vast coal, oil, gas, uran-

ium, and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The Federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the pri-

vate sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in Federal law, regulations, and procedures to remove such obstacles; identify actions State, local, and tribal governments could take to rectify identified problems and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous Federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the Federal role be fully reviewed and coordinated. Therefore, this administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that Federal activities are nonduplicative, cost-effective, and consistent with the goal of encouraging self-government with a minimum of Federal interference.

Summary

This administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with State and local governments, to resume control over their own affairs.

This administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialog with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health—and that of the tribes—depends on adopting this administration's full economic recovery program. This program calls for eliminating excessive Federal spending and taxes, removing burdensome regulations, and establishing a sound monetary policy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic change for development which will benefit not only Indian people but all other Americans as well.

REAGAN ADMINISTRATION INDIAN POLICY INITIATIVES

—Request that Congress repudiate House Concurrent Resolution 108 of the 83d Congress, which called for termination of the Federal tribal relationship. The administration wants this lingering threat of termination replaced by a resolution expressing its support of a government-to-government relationship.

—Ask Congress to expand the authorized membership of the Advisory Commission on Intergovernment Relations to include a representative of Indian tribal governments. In the interim, request that the Assistant Secretary of the Interior for Indian Affairs join the ACIR as an observer.

—Move the White House liaison for federally recognized tribes from the Office of Public Liason to the Office of Intergovernmental Affairs.

—Establish a Presidential Advisory Commission on Indian Reservation Economies to identify obstacles to economic growth and recommend changes at all levels, recommend ways to encourage private sector involvement, and advise the President what actions are needed to create a positive environment for the development and growth of reservation economies.

—Support direct funding to Indian tribes under the Title XX social services block grant to States.

—Sought and obtained funds for FY 1983 to implement the Small Tribes Initiative to provide financial support needed to allow small tribes to develop basic tribal administrative and management capabilities.

—Sought and obtained funds for FY 1983 to provide seed money for tribes for economic development ventures on reservations.

—Supported and signed into law the Tribal Governmental Tax Status Act which will provide tribal governments with the same revenue raising and saving mechanisms available to other governments.

—Support the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

—Direct the Cabinet Council on Human Resources to act as a review and coordination mechanism to ensure that Federal activities are non-duplicative, cost-effective, and consistent with the goal of encouraging tribal self-government with a minimum of Federal interference.

* * *

EXHIBIT 2

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

July 20, 1984

IN REPLY REFER TO:

Tribal Government Services (JS)

Memorandum

To: All Area Directors

From: Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Review of Tribal Bingo Management Contracts

Two federal courts have recently held that 25 U.S.C. § 81 renders tribal bingo management contracts invalid unless they are approved pursuant to that section.[1] While it is my view and the view of the Solicitor's Office that these decisions are erroneous, it is likely that tribes now operating under unapproved management contracts will, understandably, become concerned about the effect of those decisions and begin to request approval of their contracts. As you know, there are no regulations governing review of such contracts. Given our uncertain authority under present law to promulgate regulations of this nature, and the time it would take to do so, I do not intend to issue regulations at this time. Nevertheless, I believe that we must offer some assistance to tribes which are concerned

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1. *Wisconsin Winnebago Business Committee v. Koberstein*, No. 83-C-1014-S, W. D. Wis., April 2, 1984; *Flandreau Indian Management Company v. Flandreau Santee Sioux Tribe*, Civ. No. 84-4055, D. S. Dak., April 11, 1984.

about the legal status of their management contracts. Therefore, in cases where tribes request approval of their management contracts, we should undertake to review them. Our role, pending clarification of the law,[2] should be one of assisting concerned tribes to overcome the legal uncertainties caused by the federal court decisions.

Until further notice, the following instructions should be observed in reviewing tribal bingo management contracts. If you have recommendations for revisions in these instructions, please send them to the Deputy Director, Office of Indian Services. Amended instructions will be issued as necessary.

1. Authority to approve or disapprove tribal contracts may not be delegated to the Superintendents. 10 BIAM 3.5A. Accordingly, tribal bingo management contracts may be acted on only at the Area level or above. However, the Superintendents should participate in the review process and offer their recommendations to the Area Directors.

2. No contract should be reviewed unless submitted for review by a resolution of the governing body of the tribe. The resolution must set forth the authority of the tribal officials who have signed the contract on behalf of the tribe and identify the provision of the tribal constitution which authorizes it. The resolution should be attached to and made a part of the contract.

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2. We intend to seek legislative clarification of 25 U.S.C. § 81. This, however, will take some time to accomplish. H. R. 4566, the "Indian Gambling Control Act," if enacted in its present form, would clearly authorize and require the Department to review management contracts. However, that bill is not expected to be acted on in this Congress.

3. The contract must set forth (1) the time and place where it was made, (2) the purpose for which it was made, and (3) the thing or things to be done under it.

4. The contract must have a fixed limited time to run, which must be distinctly stated. The contract term should not exceed five years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. For contracts of longer than five years duration, the opportunity for renegotiation or other provision for adjustment should arise no later than five years after the contract is entered and thereafter at intervals of no longer than five years.

5. The contract must include the amount or rate per centum of the contractor's fee. It should also specify the method of computing the fee and set out the accounting procedures to be used.

6. The contract must specifically set forth any contingent matter or condition which constitutes a part of the contract. The contract should state that it represents the entire agreement of the parties.

7. The contract must include or have attached a list of all parties in interest to the contract including, on behalf of the contractor, all investors, including general and limited partners, all coroporate officers and directors, and all employees who will have day-to-day management responsibility for the gambling operation. The list must include the residence addresses, occupations and social security numbers of all such persons. If the contractor is a corporation, its articles

of incorporation and the corporate resolution authorizing the contract should also be attached.

8. The contract should specifically state whether assignments or subcontracts[3] will be permitted. If they are permitted, the contract should provide that no assignment or subcontract is valid until approved by the Secretary (*i.e.*, Area Director). Assignments or subcontracts submitted for approval should include or have attached a list of all parties in interest as defined in paragraph 7 above, including residence addresses, occupations and social security numbers.

9. Before any contract is approved, the names of persons submitted pursuant to paragraphs 7 and 8 should be transmitted to the FBI for name and record checks. All such names and results of the FBI checks should be sent to the Chief, Division of Law Enforcement Services, who will maintain a control file of this information. No contract, assignment, or subcontract should be approved where the FBI report shows a felony conviction or plea of nolo contendere for any such person. If the FBI report shows an indictment for any such person, the tribe should be so advised.

10. The contract should require the contractor to furnish the tribe, on at least a monthly basis, statements showing revenues and expenses of the gambling operation.

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3. "Subcontract" is defined as any contractual arrangement between the contractor and a third party wherein the third party will have any responsibility for the gambling operation or access to the proceeds of the operation.

11. The contract should provide that the tribe will receive its portion of the proceeds of the gambling operation on at least a monthly basis. The contract should specify the tribal official or bank account to whom the tribe's portion of the proceeds should be paid and such provision should be consistent with the tribe's constitution and bylaws.

12. The contract should provide that the tribe has the right to inspect the contractor's books relating to the gambling operation at reasonable times, such as during normal business hours, and should explicitly recognize the right of the tribe at any time to secure an independent audit of the contractor's accounts relating to the gambling operation.

13. The contract should have a provision for dispute resolution short of litigation preferably through a private procedure, such as arbitration.

14. The contract should clearly set out the grounds and procedures for termination of the contract. Breach of contract should be a ground for termination.

15. The tribe should have a valid ordinance authorizing and regulating the gambling activity to be conducted pursuant to the contract, and the contract should state that the gambling operation will be conducted in accordance with the tribal ordinance.

16. The contract should identify the party responsible for employment and personnel matters. A provision for Indian preference is desirable.

17. The contract should be consistent with any related lease of trust land.

18. The contract should provide that the contractor will not interfere with or attempt to influence internal affairs or governmental decisions of the tribe.

19. If existing provisions for law enforcement and fire protection are not adequate for the proposed enterprise, the contract should specify how these services will be provided.

20. The contract should be reviewed for legal sufficiency by the Regional or Field Solicitor's Office.

21. In your opinion, after review of a contract, is that the contract may not be in the best economic interest of the tribe, you should advise the tribe of your opinion and the reasons for it. However, if the tribe still wishes to proceed with the contract, and it appears that the tribe has entered into it at arms length and after careful consideration, the tribe's business judgment should be respected, and the contract should not be disapproved solely on the grounds that the tribe may have been able to make a better bargain. On the other hand, where it appears from the contract itself or from surrounding circumstances that the tribe has made a particularly unwise business decision or has been subjected to outside pressure, the contract should not be approved. To assist you in this assessment, you may wish to ask the tribe to submit a narrative describing how the contractor was selected and how the contract negotiations were conducted.

22. If contract modifications sufficient to bring the contract into conformity with these instructions cannot be accomplished, the contract should be disapproved.

23. Generally, the Superintendent should, within seven (7) working days of a tribal request to review a gambling management contract, transmit the documents submitted for review and approval to the Area Director. The Area Director should, within three (3) working days, send an acknowledgment of receipt of the documents to the tribe and the contractor. A final decision concerning the contract should be made as soon as possible, and not later than thirty (30) working days after the contract documents, the FBI reports, and the Solicitor's advice are received and after it is clear that no further modifications of the contract will be made.

24. Appeals from an Area Director's decision may be made pursuant to 25 CFR Part 2.

/s/ John W. (Illegible)

19. MARTIN DECLARATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV-83-1117-LEW(Tx)

THE CABAZON BAND OF MISSSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA, and BEN CLARK,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

CASE NO CV-83-3073 (LEW)

MORONGO BAND OF MISSION, INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, et al.,

Defendants,

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

DECLARATION OF ROBERT MARTIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, ROBERT MARTIN, DO HEREBY DECLARE:

1. I am the duly-elected Tribal Chairman of the Morongo Band of Mission Indians, having been elected to that position in July of 1983.

2. As Tribal Chairman, I am the highest official of the Morongo Band of Mission Indians and am responsible for overseeing all tribal programs and functions along with the Business Committee of the Morongo Band.

3. The Morongo Band of Mission Indians has a total annual income of less than ten thousand dollars ($10,000) per year from all sources. These funds are generated mainly from lease of reservation lands, from the granting of rights of way or easements for pipelines, power lines, and aqueducts across the reservation, and from similar sources. The only other funding which the Morongo Band receives is an occasional small grant from the Bureau of Indian Affairs for a specific purpose. The last such grant which we received was for $18,300 and was for the purpose of hiring a consultant to prepare policies and procedures for the tribes and for operating the tribal office.

4. The Morongo Band of Mission Indians does not have the revenues to provide necessary governmental and social welfare services to its members and believes that the operation of a Tribal Bingo Enterprise will enable the Morongo Band to generate the necessary revenues to provide these vital services. Therefore, it has entered into a new contract for the management of the Morongo Tribal

Bingo Enterprise in order to generate the revenues which are so badly needed by the tribe and its members.

5. One of the first projects that the Morongo Band is considering using its Bingo revenues for is a tribal fire department. The tribe does not presently have funding to repair and operate its fire truck. In addition, the tribe needs fire equipment and trained staff to operate its tribal fire department. The urgency for this project was recently emphasized when a home burned completely to the ground before the City or County fire departments even arrived on the scene. The slow response time of these non-Indian fire departments has been a serious problem in the past. Therefore, once the Band has revenue from the Bingo Enterprise, it hopes to address this problem as a matter of high priority. The Band is also in need of funds to repair and maintain its reservation water system which is seriously dilapidated at present. In addition, the Morongo Band is in need of funds to operate its tribal office, to build a center and provide programs for the tribal elders (senior citizens), to establish pre-school and day care programs for the children of its members, and to provide the whole range of governmental, social, educational, and welfare services for the members of the Morongo Band.

6. One of the major benefits of the Tribal Bingo Enterprise is that it created and will create employment on the Morongo Indian Reservation where the unemployment level is in excess of 64%. In its previous operation, the Enterprise employed approximately 86 Indians and it is planned that an even greater number of tribal members will be employed when we commence operations of our Bingo Enterprise again. The Morongo Band's control over all phases of the operation through our new management agreement

should insure that our tribal members are employed because preference will be given to tribal members when employees are hired.

7. The Morongo Band of Mission Indians previously required and will in the future require that, among other things, its Tribal Bingo Enterprise be open to the public, that all players must be present to play, the no alcohol may be served or consumed on the premises, that all participants must be eighteen years of age or older, and that the revenues therefrom be expended based on the tribal ordinances.

8. I am familiar with the Tribal Bingo Enterprise being operated by the Barona Group of the Capitan Grande Band of Mission Indians, having discussed it at length with the tribal chairman of said Band. To the best of my knowledge, that operation is virtually identical to the one which the Morongo Band has conducted and will conduct under its new Management Agreement with CBA Development Co., Inc. It is managed by a non-Indian who receives a percentage of the profits for its work; it is located on tribal land; the prizes sometimes exceed $250; it is open to the public, not just to members of the Barona Band; its profits are used for purposes similar to those allowed by the Morongo Bingo Ordinance, etc.

I, Robert Martin, declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief, and that I have executed this statement at Banning, California on June 26, 1984.

/s/ ROBERT MARTIN

20. INTERIOR MEMORANDUM OF MARCH 2, 1983

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

(Seal)

MAR 2 1983

Memorandum

To: Legislative Counsel

From: Acting Assistant Secretary—Indian Affairs

Subject: Justice Department Proposed Criminal Code Revision

We have received a few pages of the subject legislative proposal for comment. We request an opportunity to review the entire bill.

With regard to the portions of the proposal we have received, we have the following comments:

1. We strongly oppose the proposed new section 1166 of title 18, U.S. Code.

   Section 1166 would subject Indian individuals, Indian organizations, and tribal governments to state laws with regard to licensing, regulation, or prohibition of gambling on Indian reservations.

   Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983 which states that tribal governments *should have the primary responsibility for meeting the needs and desires of their clients,* and states that it is important *that tribes reduce their dependence on Federal funds by providing greater percentage of the cost of their self-government.* A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purposes enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is

believed that this kind of revenue-producing possibility should be protected and enhanced.

The Bureau of Indian Affairs is establishing an Ad Hoc Task Force on bingo and related gambling activities undertaken by tribes. It may be possible to provide further information on this general subject after the Ad Hoc Committee has had a chance to meet and issue a report of its findings as to the nature and extent of Indian gambling activity, provisions of laws of the various States in which such gambling is carried on, the degree of importance of the activity to the tribes in their attempts to meet the needs of their people and reduce their dependence upon the Federal Government, and any need for Federal legislation or regulation under existing law.

2. We recommend that section 1114 of Title 18, U.S. Code be amended to delete the archaic reference "the Indian field service of the United States," and insert the modern reference "the Bureau of Indian Affairs or Indian Health Service,".

21. FELDMAN DECLARATION

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Attorneys for Plaintiff
THE CABAZON BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

THE CABAZON BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
and BEN CLARK
Defendants,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,
Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA
Defendant,

and

THE STATE OF CALIFORNIA,
Defendant-Intervenor.

DECLARATION OF GLENN M. FELDMAN IN SUPPORT OF PLAINTIFF CABAZON BAND OF MISSION INDIANS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: September 24, 1984

Time: 9:00 a.m.

Courtroom: 4

I, Glenn M. Feldman, do hereby state and declare:

1. I am the attorney of record for the plaintiff Cabazon Band of Mission Indians.

2. Attached hereto are true and correct photocopies of documents that I personally obtained from the United States Supreme Court, Washington, D.C., contained in the Supreme Court's files in *Bryan v. Itasca County*.

3. Attachment 1 is a copy of the cover of the Appendix filed in *Bryan v. Itasca County*.

4. Attachment 2 is a copy of the Index to that Appendix.

5 Attachment 3 is a copy of item M in that Index, a letter from Assistant Secretary of the Interior, Orme Lewis, to the Honorable A.L. Miller, Chairman, Committee on Interior and Insular Affairs of the House of Representatives, June 26, 1953.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 1984 at Washington, D.C.

/s/ Glenn M. Feldman

ATTACHMENT 1

APPENDIX

(Filed December 3, 1975)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5027

RUSSELL BRYAN, Individually and on Behalf of
All Other Persons Similarly Situated,

Petitioner,

—*v.*—

ITASCA COUNTY, MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

Petition For Certiorari Filed July 7, 1975
Certiorari Granted November 3, 1975

ATTACHMENT 2

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-5027

RUSSELL BRYAN, Individually and on Behalf of
All Other Persons Similarly Situated,

Petitioner,

—*v.*—

ITASCA COUNTY, MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

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ATTACHMENT 3

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D.C.

June 26, 1953

My dear Mr. Miller:

This will refer to your request for a report on H.R. 1063, a bill "To amend title 18, United States Code, entitled 'Crimes and Criminal Procedure', with respect to State jurisdiction over offenses committed by or against Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State".

I recommend that this bill be enacted if its title and text are amended to conform to the enclosed draft.

The bill would extend the criminal laws of the State of California to all the Indian country within that State. Concurrently, it would withdraw the entire State from the operation of the Federal Indian liquor laws. Finally, it would permit the courts of the State of California to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property is involved.

Approximately 30,000 Indians live in the State of California. They are divided into many different groups, widely dispersed throughout the State. Their lands include a large number of small rancherias and allotments, which are also widely scattered. The State lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in title 18, United States Code, section 1151, except in the

case of the Aqua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was conferred by the Act of October 5, 1949 (63 Stat. 705.)

The applicability of Federal criminal laws is also limited. The United State district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of title 18, United States Code. As a practical matter, the enforcement of law and order among Indians in the Indian country has been left largely to the Indian groups themselves, and in California they are not adequately organized to perform that function. The Indians of the Hoopa Valley Reservation and the Yuma Reservation have a form of tribal law enforcement, but none of the other reservations in the State has any means of preserving law and order. Consequently, there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State. The Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State. This has already been accomplished on the Agua Caliente Indian Reservation by the Act of October 5, 1949 (63 Stat. 705). A likely policy should be applied to the rest of the State. In doing so due regard should be given, of course, to the safeguarding of the rights guaranteed the Indians by Federal treaties, agreements, and statutes.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs

at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H.R. 1063. No opposition to the enactment of the proposed legislation was voiced by any of the Indian groups. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State, Representatives of other groups have also indicated their approval.

Proposed legislation similar to H.R. 1063 has been discussed with the Governor of California and he has indicated his approval of the objective of the proposal. The Legislature of Cailfornia, by Senate Joint Resolution No. 29, has recently memorialized the Congress to enact H.R. 1063.

The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as these laws are of general application to private persons or private property. The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs or ordinances are not inconsistent with the applicable State laws. By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs.

The enclosed draft is designed to perfect H.R. 1063 in a manner consistent with its basic intent. The only major substantive difference is the omission of the provisions that would have excluded the entire State from the Operation of the Federal Indian liquor laws. There is no doubt that the Indians of California are as prepared to be subjected to the other laws of the State. However, general legislation to repeal, in whole or in part, the Indian liquor laws is now before the Congress, and it seems preferable to deal with the subject in that matter rather than in a bill, such as H.R. 1063, having a different primary objective.

In large measure the criminal jurisdiction provisions of the enclosed draft are identical with those of H.R. 1063. The subsection that would have reserved to the Federal courts concurrent jurisdiction over offenses by or against Indians has been omitted as its effect would be to make persons in the Indian country subject to two different, and possibly conflicting, systems of law. For like reasons, a subsection has been added that would render inapplicable in California the Federal criminal laws which apply to offenses committed by or against Indians within the Indian country. Finally, the subsection relating to the protection of trust or restricted Indian property and of Indian fishing and hunting rights has been revised in an effort to make its provisions as precise and certain as possible.

The provisions of the enclosed draft relating to civil jurisdiction are based on those of H.R. 1063, but have been recast in a form that would permit them to be incorporated in the general body of the judicial laws as now codified in title 28 of the United States Code. These pro-

visions are designed to give the State of California jurisdiction over civil controversies and transactions involving Indians to the fullest extent consistent with the discharge of Federal responsibility for the protection of trust or restricted property. The State and its courts could not take any action that would affect the status of this property in any way or that would improperly deprive the Indians of any of the benefits therefrom. However, once the trust or restriction was terminated by the United States, the jurisdiction of the State and its courts would automatically attach.

Both H.R. 1063 and the enclosed draft would repeal section 1 of the Act of October 5, 1949 (63 Stat. 705), which conferred on the State of California civil and criminal jurisdiction over the land and residents of the Aqua Caliente Indian Reservation. The enactment of H.R. 1063, applicable to the entire State, should be accompanied by the repeal of section 1 of this Act in order to make the same civil and criminal jurisdiction statute applicable to all Indian country within the State.

Since I am informed that there is a particular urgency for the submission of the views of the Department, this report has not been cleared through the Bureau of the Budget and, therefore, no commitment can be made concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

Orme Lewis
Assistant Secretary of the
Interior

Hon. A. L. Miller, Chairman
Committee on Interior and Insular Affairs
House of Representatives
Washington 25, D.C.
Enclosure

22. WELMAS DECLARATION

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THE CABAZON BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-1117 LEW (Tx)

THE CABAZON BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA and BEN CLARK

Defendants,

and

THE STATE OF CALIFORNIA,

—Defendant-Intervenor.

Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA

Defendant,

and

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

DECLARATION OF ARTHUR WELMAS IN SUPPORT OF PLAINTIFF CABAZON BAND OF MISSION INDIANS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: September 24, 1984
Time: 9:00 a.m.
Courtroom: 4

I, Arthur Welmas, declare and state as follows:

1. I am an enrolled member of the Cabazon Band of Mission Indians and am presently the elected Chairman of the Cabazon General Council and the Cabazon Business Committee. If called as a witness, I would testify of my own personal knowledge to the facts set forth herein.

2. The Cabazon Band is a federally recognized Indian tribe with Articles of Association approved by the Sacramento Area Director, Bureau of Indian Affairs and with a governing body recognized by the Secretary of the Interior. The Cabazon Band exercises soverignty over the Cabazon Indian Reservation, which was originally established by President Ulysses S. Grant on October 15, 1867.

3. The Cabazon Indian Reservation consists of approximately 1700 acres of arid, desert land in Riverside County, California, lying generally between the cities of Indio, Coachella, Mecca and Thermal. Our reservation

contains no natural resources, such as oil, natural gas, coal or timber, which could provide the Cabazon Band with a source of tribal revenue.

4. President Reagan, in his statement on "Indian Policy" last year, said that Indian Tribes must place less reliance on federal funds and federal programs, and assume a greater responsibility for their own economic development, through tribal initiatives. The Cabazon Band has believed in this philosophy for a long time. In the past, we have received a small federal grant each year from the Bureau of Indian Affairs, generally between $5.000-$7,000. However, we recognize that we cannot rely on government handout programs for our tribal existence. The Cabazon Band has adopted a policy of trying to pay our own way.

5. At the present time, the only sources of tribal revenues available to the Cabazon Band are our tribal card club, the Cabazon Indian Casino, and our tribal bingo parlor, the Cabazon Bingo Palace.

6. Without the revenues and tribal taxes from these enterprises, the Cabazon Band would have no source of funds to operate our tribal government, or to provide tribal services and programs on the reservation.

7. Among the programs and services that the Cabazon Band is able to provide from card room and bingo parlor revenues are:

A. a privately funded health insurance plan for tribal members and their families;

B. a fully-trained Cabazon tribal security force;

C. a full-time tribal office with secretary;

D. extension of basic utility services to the Reservation;

E. a U.S. Postal Service sub-station on the Reservation;

F. traditional funeral and mourning ceremony expenses;

G. upkeep of the tribal cemetary;

H. preparation, review and evaluation of other economic development proposals.

8. In addition, we have recently been able to establish a tribal court system using card room and bingo revenues. In the first case brought in our tribal court, we were able to fully resolve a long-standing dispute with a non-Indian billboard company. Attached hereto is a recent newspaper story on the successful resolution of this case, and a statement issued by the president of the billboard company, in which he commends the Cabazon Band for "having created a tribal judiciary where non-tribal members can obtain fair and impartial treatment." We now view our tribal court system as an important element of the Cabazon tribal government.

9. In addition, our tribal enterprises provide employment opportunities for all tribal members that need jobs, particularly those with the fewest job skills and the least chance for employment elsewhere. Without these jobs, many of these people would be on welfare. Almost half of the adult members of the Band are employed at the card club or bingo parlor.

10. The Cabazon Band also owns a 51% share in the Palm Springs Regional Trap and Skeet Range, which is located on our Reservation. So far, however, that business is just barely breaking even, with revenues just covering expenses. We do not know if that business venture

will ever be successful, but so far the Cabazon Band has received no income from that enterprise.

11. The State of California is suggesting in this case that our card room and bingo parlor should be shut down because they could be taken over by "organized crime." Our card room has been operating now for almost four years with no such problem. In one instance, we learned that one employee was reputed to have some "organized crime" ties. We fired that employee on the spot, no questions asked. We don't want crooks or criminals involved here. If a problem ever arose that needed law enforcement assistance, we would call in the FBI.

12. The State also gives the impression that our card room and bingo parlor are not being regulated. That is not true. Our tribal enterprises are regulated under Tribal Ordinances, and under the supervision of our tribal Commissioner of Gaming, John James, and the Cabazon Business Committee.

13. We also comply with all federal laws and regulations and with state laws where they should not have the effect of shutting down our enterprises. So, for example, the Cabazon Band has obtained a California state beer and wine license for the bar in our card club. We also pay all applicable California state sales taxes. Last year, the State of California passed a law requiring all card rooms in the state to register with the Attorney General's office. Although we don't believe that law applies to our card room on the Reservation, we voluntarily complied with that new state law and registered. Finally, federal IRS regulations require that bingo operators obtain certain information from persons who win prizes over $1,200

and report that information to the IRS. Our tribal bingo parlor complies with that federal regulation.

14. Our card club and bingo parlor are the cornerstones of our plan for future economic development of the Cabazon Indian Reservation and eventual economic self-sufficiency for the Band. For this reason, I believe it is crucial to the future of the Cabazon Band that our card club and bingo parlor be permitted to operate.

15. Without these sources of revenue, it would be virtually impossible to maintain a viable tribal government.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Indio, California this 26th day of July, 1984.

/s/ Arthur Welmas

Indians, ad company settle billboard dispute
The Press Enterprise 6/30/1984

INDIO — The Cabazon Band of Mission Indians and Naegele Outdoor Advertising Co. have settled a protracted dispute over 15 billboards installed on reservation land.

The advertising signs were erected along Interstate 10 and Highway 86 in 1979 based on a contract which the Cabazons and Naegele Co. now agree was invalid.

Under the settlement reached in the Cabazons' tribal court, the billboard company has agreed to remove all but two advertising signs. Those remaining billboards will become property of the Indian tribe, according to John Andrews, president of Naegele's California operations, based in Cathedral City.

The company will not seek any money from the Indians or state any claim on reseravtion land to install billboards in the future, according to the settlement.

John Phillip Nichols, tribal administrator, said the contracts for the billboards were negotiated and signed by then-Tribal Chairman Joseph Benitez without authorization from the tribe's General Council.

One of the contracts allowed a billboard to be installed on Benitez's alloted land and the other provided for the several billboards on reservation land controlled by the General Council, Nichols said.

The council found Benitez to be guilty of conflict of interest, non-disclosure of a business transaction and other improprieties.

Nichols said he expects that Naegele will attempt to recover any losses from Benitez in Superior Court.

Benitez could not be reached for comment yesterday. He is among a group of Cabazon dissidents who have questioned the leadership of Arthur Welmas, tribal chairman, and criticized the management services provided by Nichols and his family, who are not members of the tribe.

The dissidents have supported the attempts by state and county government to shut down the Cabazons' bingo and poker operations. Both are protected by a federal court order pending the outcome of a lawsuit filed by the Cabazons against the county.

According to a letter from Robert O. Naegele, chairman of the board of Naegele Outdoor Advertising Co., to Welmas, the contracts signed in 1978 stemmed from misrepresentations by Benitez.

Naegele Co. paid Benitez $6,304 to lease part of Benitez's alloted land for a billboard and $132,521 for billboard sites on the reservation land.

The Cabazons, in turn, paid Naegele Co. $40,000 for the billboards themselves. The check was co-signed by Benitez and William Callaway, another Cabazon dissident.

In the letter, Naegele said the company was informed by Benitez that Benitez "had the full approval of the Cabazon Band of Mission Indians" to authorize the billboard contracts.

Nichols said the Cabazons tribal court handles civil matters that pertain to reservation land. Welmas serves as chief justice. Nichols handles administrative duties and and an attorney acts as a consultant.

Naegele Co. will be returning to tribal court, Nichols said, on a restraint of trade case brought by a competitor, Seymour Buxbom of Desert Outdoor Advertising.

Attorneys for the two billboard companies have acknowledged the tribal court's jurisdiction in the dispute, according to Nichols.

STATEMENT

The Naegele Outdoor Advertising Corporation of California is pleased to announce the final resolution of a long standing dispute involving certain outdoor advertising structures located on the Cabazon Indian reservation. These structures were erected by the Naegele Corporation for the Cabazon Band of Mission Indians in 1979. Following a hearing in the Cabazon tribal court last week all par-

ties have now concluded that the alleged agreement under which these signs were originally constructed was invalid because the Cabazon Tribal Chairman at the time, Mr. Joseph Benitez never obtained the necessary approval of the Cabazon General Council to this agreement.

Under the terms of the order entered into by the tribal court the Naegele Corporation has agreed to remove all of the signs on the Cabazon Indian Reservation with the exception of one structure on Hwy 10, and one structure on Hwy 86, both of which will become the property of the Cabazon Band. In addition, both the Naegele Corporation and the Cabazon Band have agreed to waive any claims for money damages or other compensation which they may have against the other party.

The Naegele Outdoor Advertising Corporation has always sought to promote Indian tribal sovereignty. For this reason, we are extremely pleased that this matter was resolved within the Cabazon tribal court.

We found all proceedings in the tribal court to be conducted fairly and partially. We commend the Cabazon Band of Mission Indians for having created a tribal judiciary where non-tribal members can obtain fair and impartial treatment.

We, the Naegele Outdoor Advertising Company of California want to state for the record that we; as all other companies doing business on Federally recognized Indian Reservations are obligated to use the tribal court system on any reservation upon which we do business.

We want to publically state our admiration for the present tribal officers of the Cabazon Band of Mission Indians and

for the tremendous accomplishments they have achieved in teh area of economic development by the creation of the Cabazon Indian Casino, Bingo Palace and the Palm Springs Regional Trap and Skeet Range.

5/17/84 — Read by Mr. John Andrews live on KCHV — Radio Hour Show.

23. SUPPLEMENTAL RESPONSE TO INTERROGATORIES

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Attorneys for Plaintiff
THE CABAZON BAND OF MISSION INDIANS

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THE COUNTY OF RIVERSIDE, CALIFORNIA and BEN CLARK,

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THE STATE OF CALIFORNIA,

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Case No. CV 83-3073 LEW

MORONGO BAND OF MISSION INDIANS,

Plaintiff,

v.

THE COUNTY OF RIVERSIDE, CALIFORNIA,

Defendant,

and

THE STATE OF CALIFORNIA,

Defendant-Intervenor.

SUPPLEMENTAL RESPONSE OF PLAINTIFF CABAZON BAND OF MISSION INDIANS TO INTERROGATORIES PROPOUNDED BY COUNTY OF RIVERSIDE AND STATE OF CALIFORNIA

In its February 9, 1984 response to interrogatories propounded by the County of Riverside and the State of California, plaintiff Cabazon Band of Mission Indians objected to certain interrogatories on the grounds that they were irrelevant to the subject matter of this action and would not lead to the discovery of admissible evidence. Without waiving such objections, and solely for the purpose of expediting the resolution of this action, plaintiff Cabazon Band hereby supplements its responses to interrogatories number 12 and 15.

12. Describe the size and physical facility in which the bingo games are conducted. What is the total number of participants which the tribe can accommodate? What is the seating capacity? Does the bingo facility comport with local fire and safety regulations? Please respond as to the card room operations as well, and separately.

RESPONSE: The Cabazon bingo parlor is approximately 9,000 square feet in size and can accommodate ap-

proximately 500 players. The Cabazon card room is approximately 6,000 square feet in size and contains 25 card tables, which can accommodate 200 players. Both buildings comply with applicable fire and safety regulations.

15. What is the size of the jackpot or prize, and how is it determined? What is the maximum jackpot or prize? What is the average jackpot or prize? What is the minimum jackpot or prize? Please respond as to both the card room and the bingo operations separately.

RESPONSE: The Cabazon Band further objects to this interrogatory with respect to the bingo parlor on the ground that it does not specify the time period for which such information is sought; that it would require the compilation, abstract or summary of information which may or may not exist, in whole or in part; that such compilation, abstract or summary would be unduly burdensome, oppressive and expensive to perform; and that the information obtained would be of little benefit to the resolution of the instant action.

However, in the interest of expediting the resolution of this matter, the Cabazon Band, at great time and expense, has compiled the information requested for the period January 1, 1984 through April 30, 1984. For this most recent four month period, the average jackpot or prize per bingo game conducted at the Cabazon bingo parlor was $184.89. The largest jackpot or prize awarded during that period was an automobile the cost of which was $8,169.21. The smallest jackpot or prize awarded during that period was $25.00.

With respect to the Cabazon card room, the size of each card game "pot" is determined by the number of players in the game, the betting limits for that game and the frequency of betting. No information is kept, compiled or maintained with respect to the size of such "pots."

CERTIFICATION

I hereby certify that the foregoing responses and objections to interrogatories propounded by defendant County of Riverside and defendant-intervenor State of California have been made in conformity with Rule 26(g), Federal Rules of Civil Procedure.

/s/ Glenn M. Feldman
Ziontz, Pirtle, Morisset,
Ernstoff & Chestnut
Attorneys for plaintiff
Cabazon Band of Mission Indians

May 4, 1984

CERTIFICATE OF SERVICE

I, Glenn M. Feldman, do hereby certify that on this 4th day of May, 1984, I served a copy of the foregoing supplemental response of Cabazon Band of Mission Indians to interrogatories propounded by County of Riverside and State of California by Federal Express overnight delivery service addressed to:

GLENN R. SALTER, ESQ.
Deputy County Counsel
Office of the County Counsel
3535 Tenth Street, Suite 300
Riverside, CA 92501

RUDOLF CORONA, JR., ESQ.
RODERICK E. WALSTON
Deputy Attorneys General
Office of the Attorney General
110 West A Street, Suite 700
San Diego, CA 92101

I declare under the penalty of perjury that the foregoing statement is true and correct.

/s/ Glenn M. Feldman

24. BALLOT ARGUMENT (1950)

Proposed

AMENDMENTS TO CONSTITUTION

PROPOSITIONS AND
PROPOSED LAWS

Together With Arguments

To Be Submitted to the Electors
of the State of California at the

GENERAL ELECTION
TUESDAY, NOV. 7, 1950

Compiled by RALPH N. KLEPS, Legislative Counsel

Distributed by FRANK M. JORDAN, Secretary of State

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* * *

LEGALIZING AND LICENSING GAMBLING. Initiative Constitutional Amendment. Adds Article XXXII to Constitution. Permits wagering and gambling in licensed establishments. Creates five-man state commission empowered to license and supervise pari-mutual betting at tracks, off-track bookmaking, wagering on athletic and skill contests, and gambling games and devices. Authorizes commission to operate or license gaming, lotteries, etc. Imposes percentage taxes on money wagered, revenue to be deposited in pension and welfare fund for payment of aged and blind aid allowances. Names first members of commission, future members to be elected. Continues licensing authority of Horse Racing Board..

Yes ——— No ———

Argument Against Initiative Proposition No. 6

For California's welfare, for the security of your home, your children, your schools and your government, vote NO on Proposition No. 6.

At a time when the entire country is aroused over the growing power of nation-wide crime syndicates, when the prevalence of racketeering has become a national scandal, California is asked, by glib promoters, to adopt a constitutional amendment that would encourage big-time crime, civic corruption and juvenile delinquency and make law enforcement tremendously more difficult.

Deceptively titled "Jension and Welfare Funding Act," Proposition No. 6 would in no way improve the status of pension recipients nor change requirements for qualification.

Actually, Proposition No. 6 is a sordid scheme to license every known form of gambling, and create a vastly profitable gambling empire under the absolute control of five promoters who brazenly name themselves—in the act—as Gambling Commissioners! The Commission is not subject to control by either the Governor or the Legislature.

Proposition No. 6 would give these self-appointed gambling czars the power to license all types of gambling all over the State—including gambling on the results of high school and college sports. It exempts gamblers from all excise and other tax conditions.

Without restrictions of any existing law, or any future act of the Legislature, the five-man gambling commission could set up race tracks for dogs or horses in any number at any place in the State to operate 365 days of the year!

It would have the power to dictate to every gambling licensee the exact type of gambling machine he must use in his establishment.

Finally, Proposition No. 6 would give the five Gambling Czars—who name themselves in the act—the power to operate their own gambling establishments—to create a state-wide gambling monopoly under their personal control! Far from "guaranteeing" pension payments—Proposition No. 6 actually would give its promoters a blank check on the State Treasury to cover any deficits that might result from their operations. Just to get them started, the five-man commission would be handed $6,000,000 from the State Treasury!

So absolute would be the powers vested in this five-man commission that people playing friendly games of bridge, poker or canasta, for small stakes at home would have to secure licenses or face the threat of jail sentences!

The unfortunate experience of other states and communities that have attempted to curb gambling abuses by licensing has shown conclusively that serious crime rackets have mushroomed when professional gambling was sanctioned.

The eyes of the underworld are on California. If Proposition No. 6 is enacted, only disaster can result—big-time gangsterism, rampant crime of every description, civic corruption on an unprecedented scale, and a running, bloody warfare for control of the gangland rackets.

Keep the crime rackets out! Keep California a place where Californians will continue to be proud and happy to live.

Vote NO on 6!

FRANCIS V. KEESLING, SR.
Chairman, Californians Against the
Gambling Combine

MRS. EDWARD T. WALKER
President, California Congress of
Parents and Teachers

MRS. CHALMERS McGAUGHEY
Chairman, Southern California Citizens
Committee

25. BALLOT ARGUMENT (1976)

CALIFORNIA
VOTERS
PAMPHLET

June 8, 1976
Primary Election

Compiled by March Fong Eu
Secretary of State
Analyses by A. Alan Post
Legislative Analyst

(SEAL)

Ballot Title

BINGO. LEGISLATIVE CONSTITUTIONAL AMENDMENT. Permits Legislature to authorize cities and counties to provide for bingo games, but only for charitable purposes. Financial impact: None on state; nominal fiscal effects on cities and counties.

FINAL VOTE CAST BY LEGISLATURE ON ACA 3 (PROPOSITION 9):

ASSEMBLY—Ayes, 57	SENATE—Ayes, 27
Noes, 16	Noes, 11

Analysis by Legislative Analyst

PROPOSAL:

The Constitution prohibits lotteries in California. Bingo is a form of lottery if the players pay for a chance to win a prize.

This proposal would let the Legislature authorize cities and counties to permit bingo for charitable purposes.

* * *

TEXT OF PROPOSED LAW

* * *

PROPOSED AMENDMENT TO ARTICLE IV, SECTION 19

(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

ARGUMENT IN FAVOR OF PROPOSITION 9

Proposition 9 deserves your favorable vote. This proposal will add a single sentence to our State Constitution making it possible to play bingo legally provided the proceeds are used for charitable purposes only.

It is presently illegal to play bingo anywhere in California under almost any circumstances.

The enabling act, AB 144 (1975), permits bingo games for charitable purposes where it is authorized by a local ordinance and conducted by nonprofit charitable organizations. All proceeds must be used for charitable purposes. The statute (AB 144) was written to preclude participation by the underworld. The charitable organization running the game must be recognized as a charity and exempt from taxation by both State and federal government. The games must be conducted by members of the organization and no individual connected with the games can receive a salary, wage or profit from the conduct of such bingo games.

Opponents point to problems in other states long since corrected by those states. And unlike other states permitting bingo, this proposal does not permit bingo for profit.

Your favorable vote on Proposition 9 will allow those who wish to play an opportunity to play bingo while both enjoying themselves and benefiting charity.

LEROY F. GREENE
Member of the Assembly, 6th District

* * *

REBUTTAL TO ARGUMENT AGAINST PROPOSITION 9

The opponents say commercialized Bingo is big, bad, corrupt business. Is Bingo played "illegally" daily throughout California by churches, civic organizations and others big, bad, corrupt business?

The opponents point to a Florida law long since amended and the Iowa law which does not contain all our safeguards. Comparisons without merit. Neither these states nor approximately 26 others are about to give up their legalized Bingo.

The opponents refer to the Attorney General's Task Force of Legalized Gambling neglecting to state its conclusion. After reviewing all states that permitted Bingo the Task Force wrote: (pages 32-33) "The general opinion of both law enforcement and public administration authorities interviewed seems to confer approval on the legalization of Bingo for civic, religious and charitable purposes. On the whole, they felt that a properly regulated and conducted Bingo game presented no law enforcement problems of substance."

The opponents want more bureaucracy; statewide licensing, statewide regulation, limits on frequency of games and statewide supervision. Our Statute provides local con-

trol and supervision requiring an ordinance by the City or County before Bingo could be played.

A "no" vote will not prevent Bingo from being played. It is played illegally daily.

A "yes" vote will allow people to play Bingo legally. There will be no commercial profit. All proceeds go to charity.

Finally, opposition arguments concentrate on the Attorney General's Task Force Report—But the Attorney General does not oppose this measure. He has reviewed the Statute and finds no enforcement problems.

LEROY F. GREENE
Member of the Assembly, 6th District

26. ASSEMBLY INTERIM COMMITTEE REPORT

ASSEMBLY INTERIM COMMITTEE REPORTS
1961-1963

VOLUME 27 NUMBER 2

REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON CONSTITUTIONAL AMENDMENTS TO THE CALIFORNIA LEGISLATURE

(House Resolution 361, 1961)

PART 1

MEMBERS OF THE COMMITEE
MILTON MARKS, *Chairman*
DON A. ALLEN, SR., *Vice Chairman*

TOM BANE	BRUCE SUMNER
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MELVYN J. COBEN, *Committee Consultant*
ALMA RICKER, *Committee Secretary*

January 7, 1963

Published by the
ASSEMBLY
OF THE STATE OF CALIFORNIA

HON. JESSE M. UNRUH	HON. CARLOS BEE
Speaker	*Speaker pro Tempore*
HON. JEROME R. WALDIE	HON. JOSEPH C. SHELL
Majority Floor Leader	*Minority Floor Leader*

ARTHUR A. OHNIMUS
Chief Clerk

III. LOTTERIES—BINGO

Under Article IV, Section 26, of the Constitution, lotteries are prohibited. This section has been interpreted to classify bingo as a lottery, and thus prohibited. Many worthwhile organizations have historically used bingo as a means of raising revenue for legitimate functions. The problem that California has faced on this subject is that legalization of bingo would not only permit legitimate organizations to participate, but would also allow introduction of persons and groups whose purposes are not as worthwhile.

Unless adequate standards were established, the repeal of Article IV, Section 26 of the Constitution as it relates to bingo could lead to encouragement of professional gambling. For this reason there appears universal support for the position that if bingo were legalized only members of an organization in good standing would be allowed to operate the game for the organization in question.

Another problem involved is the proper classification or organizations so as to prevent the formation of groups which had an alleged proper purpose, but whose main function was to encourage gambling under the cloak of legality.

A number of the witnesses who appeared before the committee recommended that only congressionally chartered organizations be permitted to play bingo. Such a limitation would have excluded many legitimate civic clubs and organizations. The Legislative Counsel's opinion following this analysis sets out an exhaustive list of 51 congressionally chartered organizations. In addition, 13 states,

the Legislative Counsel points out, presently permit bingo games for the benefit of nonprofit organizations chartered by Congress.

During the course of the committee's hearing on this matter eight issues were raised:

1. Permit the unrestricted playing of bingo.
2. Permit bingo playing only by congressionally chartered organizations.
3. Permit bingo playing by any state-approved organization of a charitable character.
4. Permit only the members of the organization to play.
5. Permit only the members to operate the game, but allow the public to play.
6. Limit the purposes for which bingo raised funds can be used.
7. After having limited the organizations allowed to use bingo as a fund-raising device, leave the use of funds unrestricted.
8. Should a tax be imposed and, if so, by whom, city, county or state?

The organizations which appeared in support of the measure before the committee were of the highest caliber and indicated that the purposes for which would operate bingo games, if legalized, were most worthy. The committee also received recommendations that the committee consider broadening the scope of organizations which would be permitted to engage in such games beyond those specifically mentioned in the legislation presented to the committee. Such a recommendation raised the question of setting appropriate standards which would be equitable and which would protect the State of California from in-

filtration of undesirable elements into the State who might take advantage of legislation designed to benefit worthwhile groups and organizations.

CONCLUSION

In light of the law enforcement problem inevitable in the legislation of bingo, plus the manifestly difficult problem of classifying organizations which should be allowed to use bingo for fund-raising purposes, the committee concluded further study of this matter is needed. Since the purposes for which funds would be raised are obviously beneficial to the people of the State, after solving the procedural problems involved. this matter should be reconsidered.

STATE OF CALIFORNIA
OFFICE OF LEGISLATIVE COUNSEL
SACRAMENTO, CALIFORNIA, May 8, 1962

HON. CHARLES W. MEYERS
State Building, San Francisco 2, California

No. 85-1708

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE APPELLANTS

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

PARTIES

The appellants are the State of California; Riverside County, California; and Ben Clark, Sheriff of Riverside County.

The appellees are the Cabazon Band of Mission Indians and the Morongo Band of Mission Indians.

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No. 85-1708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE APPELLANTS

OPINIONS BELOW

The U. S. Court of Appeals filed an original opinion reported at 783 F.2d 900, and on its own motion filed an amended opinion not yet officially reported. The amended opinion is reprinted in the Appendix attached to the Jurisdictional Statement ("JS App.") 1-11.

The order and judgment of the district court are reprinted at JS App. 12-15 and 16-18, respectively. The district court did not issue a written opinion, findings of fact, or conclusions of law.

JURISDICTION

These actions for declaratory and injunctive relief challenge the validity of State and local gambling laws as applied on Indian reservations. The federal courts have jurisdiction under 28 U.S.C. § 1331.

The final decision of the U. S. Court of Appeals was filed and entered on April 8, 1986. JS App. 1. No petition for rehearing was filed. The notice of appeal was filed in the U.S. Court of Appeals on April 14, 1986. JS App. 21-22.

This appeal is filed under 28 U.S.C. § 1254(2), which authorizes appeals from federal appellate decisions striking down state laws as "invalid" under federal law. California's gambling laws are meant to apply on Indian reservations as elsewhere, and the Ninth Circuit invalidated California laws as applied on Indian reservations. Indeed, the plaintiff Tribes' action directly seeks a declaratory judgment overturning State and local gambling laws as so applied. JA 34-35, 43-45. The Ninth Circuit clearly intended to invalidate California laws as applied; the court described the nature of California's gambling laws, JS App. 2; made repeated references to California's "bingo statute," "bingo law," and "gambling laws," *id.* at 2, 3, 5, 7, 8; and concluded that California could not apply its "gambling laws" on Indian reservations and enjoined California from so applying its "gambling laws." *Id.* at 11. Thus, the Ninth Circuit clearly struck down California laws as applied.

This Court has held that appeals are proper under 28 U.S.C. § 1254(2) where a state statute is struck down "as applied to the facts of the case," even though the statute is unaffected as applied in other contexts. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ____ U.S. ____, 54 U.S.L.W. 4860, 4862 (June 27, 1986); *Dutton v. Evans*, 400 U.S. 74, 76 n. 6 (1970); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). Thus, an appeal is proper here.

This Court has also held that appeals are proper under 28 U.S.C. § 1257 when taken from state court decisions *upholding* state laws as applied on Indian reservations. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In light of the "history of . . . close relationship between" sections 1254(2) and 1257, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 n. 9 (1984), an appeal

should be equally proper when taken from federal appellate decisions *invalidating* state laws as applied on Indian reservations. The question whether the state law is "valid" is the focal inquiry in both sections, and therefore the propriety of the appeal should not depend on which section is invoked.

This Court's decisions in *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), and *Silkwood v. Kerr-McGee Corp., supra*, 464 U.S. 238, do not suggest an opposite result. In neither case did the federal appellate court invalidate a state statute, even as applied. In *Perry*, the appellate court invalidated a collective bargaining agreement undertaken pursuant to a state statute, but did not invalidate the statute itself. 460 U.S. at 42-44. In *Silkwood*, the appellate court invalidated a lower federal decision granting a punitive damages award under authority of a state statute, but did not invalidate the statute itself. 464 U.S. at 246-248. As the Court noted in *Silkwood*, "while the award itself was struck down, the statute authorizing such awards was left untouched." *Id.* at 247. Indeed, the Court in *Silkwood* noted that the appellate court had not mentioned the state statute in its decision. *Id.*

In the instant case, however, the Ninth Circuit directly struck down State and local gambling laws as applied on Indian reservations, rather than invalidating actions undertaken in reliance on the State and local laws. As noted above, the court amply cited and discussed the State and local laws in its decision. JS App. 2, 3, 5, 7, 8. Indeed, unlike *Perry* and *Silkwood*, this action directly seeks a declaration invalidating State and local laws as applied here. Therefore, *Perry* and *Silkwood* are not controlling.

If, however, this Court determines that an appeal is improper here, it should review the matter by writ of certiorari. 28 U.S.C. § 2103; see *Palmore v. United States*, 411 U.S. 389, 396 (1973).

FEDERAL LAWS

This case primarily involves federal common law principles governing state jurisdiction over Indian reservations. The case also involves two federal statutes: Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360, reprinted at JS App.

23-25; and the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, reprinted at JS App. 25-26.

STATEMENT OF THE CASE

1. Nature of the Controversy

The Cabazon Band of Mission Indians and the Morongo Band of Mission Indians ("Tribes") occupy separate reservations in Riverside County, California. Cab. Stip. 2-3, Mor. Stip. 1-2 (CR 54; JA 60-61, 79).[1] The Cabazon reservation was authorized by presidential executive orders issued in 1876 and 1891, and the Morongo reservation was authorized by a presidential executive order issued in 1877 and by subsequent presidential proclamations, federal statutes, and deeds. Cab. Stip. 3, Mor. Stip. 2-3 (JA 61, 80). The Cabazon reservation consists of 1,700 acres of land, and the Morongo reservation consists of 32,300 acres. Cab. Stip. 3, Mor. Stip. 2 (JA 61, 79). The Cabazon Tribe has 25 enrolled members and the Morongo Tribe has 730 enrolled members. Cab. Stip. 3, Mor. Stip. 3 (JA 61, 80).

The Tribes conduct high stakes bingo games for profit on their reservations. Cab. Stip. 5-7, Mor. Stip. 4-5 (JA 63-65, 81-83). The games are conducted in large bingo parlors. The Cabazon parlor can accommodate 500 players, and the Morongo parlor can accommodate 1,400 players. Cab. Stip. 7, Mor. Stip. 6 (JA 65, 83). The games are operated by non-Indian operators pursuant to management agreements with the Tribes, and the non-Indian operators receive a substantial percentage of the profits. Cab. Stip. 5-7, Mor. Stip. 4-5 (JA 63-65, 81-83). The games are authorized by ordinances adopted by the Tribes. Cab. Stip. 5, Mor. Stip. 4 (JA 64, 81). The Cabazon ordinance has not been submitted to or approved by the Secretary of the Interior, although the Secretary has approved the Morongo ordinance. *Id.*

---

[1] "CR" refers to the Clerk's Record, and specifically to the item number in the district court docket entries; "JA" refers to the Joint Appendix; "Cab. Stip." refers to the stipulation of the facts between the Cabazon Band and the defendants; and "Mor. Stip." refers to the stipulation of facts between the Morongo Band and the defendants.

Neither the Secretary nor any other federal officer regulates, supervises, or monitors the tribal games.

The tribal bingo games are patronized by hundreds of players each night. Hopper Dec. 6 (CR 58, Exh. 17; JA 178). Most of the players are non-Indians. *Id.* As the Ninth Circuit observed, the games "are played predominantly by non-Indian participants." JS App. 2. The bingo parlors are situated adjacent to a major highway linking Los Angeles with Palm Springs, and the bingo parlors are clearly visible from the highway. Cab. Stip. 4, Mor. Stip. 4 (JA 65, 83). The games are advertised on billboards situated along the highway, and also in newspapers and brochures distributed in surrounding non-Indian communities. *Id.*

The tribal bingo games violate California's gambling laws. Under California law, lotteries are prohibited except where specifically authorized by law. Cal. Pen. Code § 320. An exception from the lottery ban is provided for bingo conducted by charitable organizations. *Id.* at § 326.5. Charitable bingo is subject to numerous statutory safeguards to prevent organized criminal infiltration. In particular, charitable bingo must be conducted by members of the charitable organization itself; profits must be maintained in special fund accounts; and jackpots cannot exceed $250. *Id.;* see note 14, *infra.* As the Ninth Circuit noted, the tribal games violate all these provisions. JS App. 2. Indeed, the tribal jackpots greatly exceed $250. The Cabazon jackpots include cars, pickups, boats, and cash awards of thousands of dollars.[2] The Morongo Tribe advertises that its games provide the "World's Largest Jackpots!", Salter Dec., Exh. A (CR 88), and that it paid

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[2] A State investigator, randomly visiting the Cabazon bingo parlor one night in 1984, observed that the prizes included: a 1984 Dodge pickup and All Terrain vehicle; a Sylvan Bass boat valued at $6,771; a do-it-yourself jackpot of $2,250; a Bonanza Bingo jackpot of $6,300; and regular jackpots of $150, with a super jackpot of $750 for four games. Hopper Dec. 3-5 (CR 58, Exh. 17; JA 175-177).

The Morongo bingo games have advertised: "High Stakes; Over $20,000 nightly; more than $5,000,000 in 1983; $15,000.00 Jackpot Must Go Every Saturday Night in January; 1984 Auto-Every Sunday Must go; Matinee Every Saturday During January; Mystery Door Prize Every Night in January." Salter Dec., Exh. B (CR 88).

over $5 million in jackpots in 1983. See note 2, *supra*. Another tribe in California, the Barona tribe, advertises: "$1,000,000; Million Dollar Bingo Blackout." Salter Dec., Exh. C (CR 88).

The Cabazon Tribe also conducts three card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. Cab. Stip. 4-5, 7 (JA 62-63). The card parlor games violate Riverside County Ordinance No. 331, which prohibits these card games in all areas within the County's jurisdiction. *Id.*

The tribal activity here is part of a growing movement by Indian tribes nationally to conduct high stakes gambling operations—mostly featuring bingo—designed to attract non-Indian players. At least 100 such operations were in effect in 19 states last year—including 26 in California alone—and the present figure is probably higher. JS App. 27-30. Many such operations generate gross revenues of up to $1 million monthly. See note 16, *infra*. This test case raises the question whether such tribal operations are lawful where they violate state and local gambling laws.

2. Proceedings Below

The Tribes brought consolidated actions for injunctive and declaratory relief and for damages against Riverside County, alleging that State and County laws prohibiting commercial gambling cannot be applied to the tribal bingo and card parlor games here. CR 36, 65 (JA 21, 36). The State of California intervened. CR 43, 68 (JA 51, 54). The parties filed cross-motions for summary judgment on the jurisdictional question whether State and County gambling laws apply on Indian reservations. CR 57, 60, 62. The district court granted the Tribes' motion and denied the State and County's motion, ruling that State and County gambling laws cannot be so applied. CR 102, 103; JS App. 12-20. The court issued final judgment on the jurisdictional issue under Rule 54(b) of the Federal Rules of Civil Procedure; issued a permanent injunction restraining the State and County from applying their gambling laws on the reservations; and

retained jurisdiction to consider the damages issues. *Id.*[3] The State and County appealed.

On appeal, the Ninth Circuit affirmed the lower decision, ruling that State and County gambling laws cannot be applied on Indian reservations. JS App. 1-11. The court reasoned that such application is not authorized by the "federal common law," as applied by this Court in *Rice v. Rehner*, 463 U.S. 713 (1983). According to the court, Indian tribes have an "inherent sovereign" right to conduct gambling operations patronized by non-Indians, and the tribal interest in raising revenue outweighs the State and County interest in preventing organized criminal intrusion. JS App. 10-11. The court also ruled that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and the Organized Crime Control Act, 18 U.S.C. § 1955, do not authorize the application of State and County gambling laws on Indian reservations. JS App. 3-6. The court's decision applied both to the State bingo statutes and the County card parlor ordinance. JS App. 2 n. 1.

The State and County appealed the Ninth Circuit decision to this Court under 28 U.S.C. § 1254(2). This Court granted review on June 9, 1986, and deferred consideration of the jurisdictional question until the hearing on the merits.

SUMMARY OF ARGUMENT

I

Since Congress has never fully determined whether state laws apply on Indian reservations, this Court has adopted federal common law in determining their applicability. Under the federal common law, the applicability of state laws on Indian reservations depends on the balance of state, federal, and tribal interests. In *Rice v. Rehner*, 463 U.S. 713 (1983), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), this Court held that, under the balancing test, states have the right to regulate sales by Indian tribes to non-Indians on a

[3] On stipulation, the district court subsequently dismissed the damages claim filed by the Morongo Tribe.

reservation, particularly where the tribes attempt to "market an exemption" from state laws to non-Indians.

The balancing test supports the application of State and local gambling laws here. The Tribes are selling a product—high stakes bingo—to non-Indians. The games are profitable only because they provide a product that non-Indians cannot lawfully obtain elsewhere. Thus, the Tribes are taking commercial advantage of State gambling restrictions against non-Indians. They are "marketing an exemption" from State gambling laws to non-Indians. Additionally, Indian tribes have not traditionally conducted gambling operations that solicit and depend on non-Indian patronage. For these reasons, the tribal interest is entitled to little deference here.

The State has a vital interest in prohibiting the tribal bingo games here. First, State gambling policy is frustrated if Indian tribes can market an exemption from State gambling laws to non-Indians. Second, the tribal bingo games create a serious risk of organized criminal infiltration. The risk arises because the games feature high stakes and are not regulated. The Tribes themselves lack the law enforcement capability to ensure that the games are honestly run, or to handle the law enforcement problems arising when hundreds of non-Indians enter the reservations to play the games. The State interest is thus entitled to considerable deference.

The federal interest is, at most, neutral in this case. Congress has not authorized Indian tribes to conduct gambling operations in violation of state law. No federal agency or official regulates, supervises, or monitors the tribal games. Therefore, no federal regulatory scheme or policy supports the tribal games. Indeed, the Organized Crime Control Act, which authorizes state and local gambling laws to be applied on federal lands, establishes a federal policy in support of the application of State and local laws here.

Therefore, the common law balancing test supports the application of State and County gambling laws in this case.

II

Public Law 280, which authorizes California and certain other states to exercise civil and criminal jurisdiction over Indian reservations, authorizes California to apply its gambling laws on Indian reservations. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court stated in dictum that Public Law 280 does not authorize states to apply their "civil regulatory" laws on Indian reservations. In *Rice v. Rehner, supra*, 463 U.S. 713, however, this Court held that, under the common law balancing test, California has the right to regulate liquor sales on Indian reservations. Thus, *Rice* and *Bryan* create the anomaly that, although Public Law 280 was intended to *broaden* state jurisdiction over Indian reservations, Public Law 280 actually confers *less* regulatory jurisdiction than states already have under the federal common law. This Court should resolve the anomaly by rejecting the *Bryan* dictum that state "civil regulatory" laws do not apply, particularly because the dictum is inconsistent with specific provisions in Public Law 280 and with its legislative history. Moreover, even assuming the validity of the *Bryan* dictum, California's gambling laws are "criminal prohibitory" and hence are included under Public Law 280 in any event.

III

The Organized Crime Control Act authorizes state and local gambling laws to be applied on federal lands, including Indian reservations. Thus, Congress, rather than preempting state laws as applied here, has affirmatively authorized their application. The Organized Crime Control Act not only directly authorizes state laws to be applied here, but also expresses a federal policy supporting that result, as federal policy is relevant under the common law balancing test.

ARGUMENT

I

THE BALANCE OF STATE, FEDERAL, AND TRIBAL INTERESTS, AS RELEVANT UNDER THE FEDERAL COMMON LAW, SUPPORTS THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS.

A. The Balancing Test

Since Congress has never fully determined whether state laws apply on Indian reservations, this Court has developed federal common law governing the matter. Initially, this Court held that Indian reservations are analogous to foreign nations whose boundaries are impenetrable by state law. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Today, a more flexible view prevails. Under the modern view, state laws are applicable on Indian reservations unless they are preempted by federal law or infringe on tribal self-government. See *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 167-173 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-75 (1962). Increasingly, the jurisdictional focus is on federal preemption rather than tribal sovereignty. "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards reliance on federal preemption." *McClanahan*, 411 U.S. at 172. Tribal sovereignty is relevant "not because it provides a definitive resolution of the issues," but "because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172; see also *Rice*, 463 U.S. at 718.[4]

The preemption analysis, as applied in Indian law cases, requires a balancing of state, federal, and tribal interests. See *Rice*,

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[4] No treaties exist between California Indian tribes and the federal government. *Indians of California v. United States*, 98 Ct.Cl. 583, 585 (1943). Therefore, the preemption issue as relevant here must focus on federal statutes, not federal treaties.

463 U.S. at 720. As this Court stated in *White Mountain Apache Tribe*, the question requires a "particularized inquiry" into "the nature of state, federal, and tribal interests at stake." 448 U.S. at 145. The balancing test, or "particularized inquiry" test, is a form of federal common law, for it is a judicial doctrine rather than a constitutional or statutory one; therefore, Congress can "pre-empt" or displace the balancing test by enacting legislation defining state jurisdiction over Indian reservations. Cf. *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981) (Clean Water Act displaces federal common law of nuisance as applied). Congress has not preempted or displaced state gambling laws as applied on Indian reservations, as the Ninth Circuit properly held and as we explain below. JS App. 6, & n. 6; see pages 30-31, 33-34, *infra*.[5] Therefore, the common law balancing test applies here.

Prior to the Ninth Circuit decision here, only two appellate courts have applied the balancing test in determining whether state gambling laws apply on Indian reservations, and both concluded that the balancing test supports their application. See *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.), *appeal dismissed*, 464 U.S. 923 (1983); *Oklahoma v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985).[6] In *Penobscot*, the Maine Supreme Judicial Court held that, under the balancing test, Maine can prohibit Indian commercial "beano"—a form of bingo— played primarily by non-Indians. 461 A.2d at 482-487.

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[5] Specifically, the Ninth Circuit held, as we explain more fully later, that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, which authorizes California and certain other states to exercise limited civil and criminal jurisdiction over Indian reservations, does not preempt state or local laws otherwise applicable on Indian reservations. JS App. 6-7, & n. 6.

[6] As explained later, the Fifth Circuit and the Ninth Circuit in an earlier decision held that Public Law 280 and the Organized Crime Control Act do not authorize state gambling laws to be applied on Indian reservations. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); see pages 39-40, *infra*. Both decisions interpreted and applied federal statutes, and did not apply the common law balancing test.

The Court reasoned that the State has a "legitimate governmental interest" in prohibiting the games; that the Tribe would have "nothing to 'sell' " if the State did not prohibit the games; and that the Tribe was attempting to "market an exemption" from State gambling laws to non-Indians. *Id.* at 485. The Court also held that commercial beano has played no part in the Tribe's "historical culture and development," is "not uniquely Indian in character," and is "not a traditional Indian practice." *Id.* at 490.[7]

In *Seneca-Cayuga*, the Oklahoma Supreme Court held that Oklahoma can prohibit Indian commercial bingo games patronized by non-Indians.[8] The Court reasoned that "bingo is [not] a traditional tribal activity," that its "main (and perhaps only) purpose" is "to generate funds for the Tribes," and that the Tribes' "legitimate interest" in "economic development" does not outweigh the State's "legitimate interest in preventing infiltration of organized crime. . . ." 711 P.2d at 90, 91. The Court noted that this Court "has extended state laws to tribal commercial activities affecting substantial numbers of non-Indians, where such non-Indian citizens evade state laws by benefiting from an exclusively Indian exemption." *Id.* at 90-91.

Applying the balancing test here, the Ninth Circuit reached the opposite result, holding that State gambling laws infringe on tribal sovereignty and are therefore inapplicable on Indian reservations.

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[7] This Court dismissed the Tribe's appeal in *Penobscot* "for want of a substantial federal question." 464 U.S. 923 (1983). Since the dismissal of an appeal on such grounds is a disposition on the merits, *Hicks v. Miranda*, 422 U.S. 332, 345 (1975), this Court in effect affirmed the Maine Court decision in *Penobscot*.

In a second, alternative holding, the Maine Court in *Penobscot* held that a federal statute, the Maine Indian Claims Settlement Act, also supports the conclusion that Maine can prohibit the Indian commercial bingo games. 461 A.2d at 487-490.

[8] The Court remanded for determination of whether the tribal games were patronized by Indians or non-Indians. 711 P.2d at 92, & n. 76. This factual issue is not presented here because the Ninth Circuit properly held that the tribal games "are played predominantly by non-Indian participants." JS App. 2.

JS App. 6-11. Significantly, the court held that State laws are *not* preempted by federal law. *Id.* at 6-7, & n. 6. Instead, the court rested its decision on tribal sovereignty grounds. *Id.* at 7-11. According to the court, the Tribes have a "sovereign" interest in raising revenue—regardless of the form of "activity" by which the revenue is raised—and the tribal revenue-raising interest outweighs the State's "legitimate" interest in preventing organized criminal infiltration. *Id.* at 7, 8, 10-11. Since the court held that federal laws do not preempt State laws, this case is distinguished from those where this Court has invoked federal preemption in striking down state laws as applied on Indian reservations. See, *e.g., White Mountain Apache Tribe,* 448 U.S. 136; *McClanahan,* 411 U.S. 164; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). In effect, the Ninth Circuit invoked tribal sovereignty as an absolute bar to State jurisdiction, rather than as a "backdrop" in analyzing the preemption issue.

As we now explain, the balance of State, federal, and tribal interests supports the application of State and local gambling laws here, and therefore the State court decisions in *Penobscot* and *Seneca-Cayuga,* not the Ninth Circuit decision below, properly follow and apply the principles of modern federal Indian law.

B. The Tribal Interest

1. "Marketing an Exemption"

Turning first to the tribal interest, this Court has held that the tribal interest is weakest, and the state interest strongest, where the tribal activity affects non-Indians on the reservation. See *Rice,* 463 U.S. at 721, & n. 7; *Washington v. Confederated Tribes of the Colville Reservation ("Colville"),* 447 U.S. 134, 151 (1980). In *Rice,* this Court held that California has the right to regulate liquor sales by licensed Indian traders to non-Indian purchasers on an Indian reservation. The Court reasoned that "any interest in tribal sovereignty" is implicated only where the State regulates sales "to other members of" the tribe, not where the State regulates sales to non-Indians. 463 U.S. at 721. Referring by analogy to its tax decisions, the Court stated that a state may tax sales by Indians to non-Indians on a reservation even though the tax " 'seriously disadvantages or eliminates the Indian retailer's

business with non-Indians, . . . [because] the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.' " 463 U.S. at 721 n. 7, quoting from *Colville,* 447 U.S. 151, & n. 27. The Court concluded that State regulation of sales to non-Indians "simply 'does not contravene the principle of tribal self-government.' " 463 U.S. at 721 n. 7, quoting from *Colville,* 447 U.S. at 161. See also *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 475-476 (1976).

In *Colville,* this Court held that the tribal interest is particularly weak where the tribe not only sells products to non-Indians, but also attempts to "market an exemption" from state laws to non-Indians. 447 U.S. at 155. There, the Court upheld the State of Washington's right to tax on-reservation cigarette sales by Indian smokeshops to non-Indian purchasers. The Court noted that "most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices" offered by the smokeshops, and that the "market existed in the first place only because of a claimed exemption from these very [state] taxes." 447 U.S. at 154, 157. The tribe's "primary argument," the Court noted, was an "economic" one, and imposition of the state tax will mean that the tribes will "no longer enjoy any competitive advantage" over off-reservation businesses. *Id.* at 154. The Court concluded:

> "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. [Citations omitted.] *What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation* . . . . We do not believe that principles of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes thus to *market an exemption* from state taxation to persons who would normally do their business elsewhere." *Id.* at 155 (emphasis added.)

The factors applied in *Rice* and *Colville* strongly support the application of State and local gambling laws here. The tribal bingo operations affect non-Indians, for the games attract, and are intended to attract, non-Indian players. As the Ninth Circuit

observed, the games "are played predominantly by non-Indian participants." JS App. 2. Since Indian tribes have "no vested right" to sell products to non-Indians, see *Rice*, 463 U.S. at 721 n. 7, tribal sovereignty is not implicated here.

More importantly, the Tribes are attempting to "market an exemption" from State gambling laws to non-Indians. The Tribes are marketing a product—high stakes bingo—that is illegal under State law. Indeed, the product has value only *because* it is illegal under State law. The tribal games are patronized by non-Indians who cannot lawfully play high stakes bingo elsewhere in California. The tribal games would not be successful if the State legitimized high stakes bingo, thus allowing non-Indian businesses to compete with tribal businesses. Certainly the hundreds of non-Indians who play the games each night would patronize other, more local establishments if they were available. The Cabazon games, for example, would not be profitable if played only by members of the Tribe, since the Tribe has only 25 members, Cab. Stip. 3 (JA 61); the games are profitable because they attract hundreds of non-Indians nightly who cannot lawfully play high stakes bingo elsewhere.

Thus, California has created the "market" by prohibiting high stakes bingo, and the Tribes are exploiting the market by openly selling the illegal product to non-Indians. The Tribes are taking commercial advantage of California's gambling prohibitions by marketing the very product that is prohibited. They are, in effect, selling exemptions from California's gambling laws to non-Indians. The situation is the same as if the Tribes were openly selling contraband, as defined by state law, to non-Indians. The success of the tribal venture depends less on the tribal effort than on State laws prohibiting such ventures.

The tribal games frustrate California's legitimate interest in preventing its non-Indian citizens from playing high stakes bingo, thus making it more difficult for California to protect this interest even in off-reservation areas. If non-Indians can play high stakes bingo on Indian reservations, there is little reason for California to prohibit such games off the reservation. That is, if California's gambling prohibitions can be so easily circumvented, there is little reason for the prohibitions to be maintained. Legitimization of

tribal commercial endeavors that take advantage of state restrictions against non-Indians—whether the restrictions apply to bingo or other commercial activity—makes it logically difficult for the state to maintain the restrictions, and places improper pressure on the state to remove the restrictions altogether. In short, the tribal games, by exploiting California's policy against high stakes gambling, render the policy largely pointless. The effect of the tribal activity here is thus not confined to the reservation, but rather "spills over" into off-reservation areas by undermining the State's general policy against high stakes gambling. Cf. *Rice*, 463 U.S. at 724.

The Ninth Circuit held that the case involves "only Indians" because California regulates "Indian" operators rather than non-Indian patrons. JS App. 8. To the contrary, the case involves non-Indians because the tribal games solicit and depend on non-Indian patronage. The Ninth Circuit improperly focused on the incident of state regulation rather than its purpose and effect, contrary to the "practical effect" analysis followed by this Court in other contexts. See, *e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (constitutional validity of state taxes as applied to interstate commerce depends on their "practical effect"). In fact, the State regulates operators rather than patrons because the operators control the games, and hence are most likely to be subject to organized crime influence. Further, it would be difficult to regulate patrons because it is not known whether a person departing an Indian reservation has played the games or not. In *Rice*, this Court upheld a State regulation whose incident applied to Indian sellers rather than non-Indian buyers, and did not suggest that the case involved "only Indians" because the immediate incident fell on Indian sellers. In any event, the immediate incident of the State regulation here falls on non-Indians because the games are operated by non-Indian professional gamblers. JS App. 2. For these reasons, the Ninth Circuit's distinction between operators and patrons is misplaced.[9]

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[9] The Ninth Circuit distinguished *Rice* on the ground that *Rice* involved a federal liquor statute—18 U.S.C. § 1161—not relevant here. JS App. 5 n. 4. In *Rice*, however, this Court primarily applied the common law balancing test and concluded that state interests outweigh

2. The Tribal "Tradition"

In *Rice*, this Court held that the tribal "tradition" is highly relevant in evaluating the tribal interest. 463 U.S. at 719-720. According to *Rice*, if a sovereign tribal tradition exists, state laws generally cannot be applied on Indian reservations unless Con-

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tribal interests because of the absence of a sovereign tribal "tradition." 463 U.S. at 720-725. After applying the balancing test, the Court ruled that the federal statute, 18 U.S.C. § 1161, did not preempt state laws and indeed supported their application. *Id.* at 725-735. Thus, the analytical mode was that the common law balancing test supported the application of state law, and that the federal statute did not change the result and indeed supported it. *Rice*, insofar as it applied the balancing test, is thus not distinguishable here. Moreover, as explained later, the Organized Crime Control Act authorizes the application of state gambling laws on Indian reservations, and this federal enactment expresses federal gambling policy here as clearly as 18 U.S.C. § 1161 expressed federal liquor policy in *Rice*. See pages 31, 41-42, *infra*.

The Ninth Circuit distinguished *Colville* on the ground that the Tribes here, unlike those in *Colville*, are providing "value" to non-Indian patrons. JS App. 13. To be sure, *Colville* did observe that the tribal interest is stronger "when the [tribal] revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U.S. at 156-157. In this case, however, the tribal product—high stakes bingo—has "value" only because it is prohibited by State law. Thus, the tribal product has "value" only in the sense that contraband has "value," and such "value" is not judicially cognizable. In any event, the "value" owes less to tribal initiative than to State policy, and thus cannot weigh in favor of the tribal interest here.

Finally, *Colville*, we believe, stands for the broader proposition that Indian tribes cannot "market an exemption" from state laws to non-Indians, whether or not "value" is provided. As one commentator has stated:

> "The *Colville* Court . . . observed that reservation businesses are not entitled to legally enforced commercial advantages and should be treated just as non-Indian business would be. [Citation omitted.] This argument suggests that the Court may be willing to limit the immunity given to tribes when they act commercially." Note, "In Defense of Tribal Sovereign Immunity," 95 HARV. L. REV. 1058, 1068 (1982) (emphasis added).

gress expressly authorizes their application. *Id.* If, however, a sovereign tradition does *not* exist, or if the balance of state, federal, and tribal interests otherwise requires, the "backdrop" of tribal sovereignty is accorded "less weight." *Id.* Although ambiguities in federal Indian law are generally construed in favor of Indian tribes, see, *e.g., McClanahan,* 411 U.S. at 170-171, this canon of construction does not apply in the absence of a sovereign tribal "tradition." *Rice,* 436 U.S. at 731.

The tribal activity here is well outside the tribal "tradition." Indian tribes have not traditionally conducted high stakes gambling operations that solicit and depend on non-Indian patronage, particularly where the operations are successful because they violate state law. The economic base of Indian tribes has never depended on large-scale gambling operations, conducted in buildings erected specially for gambling purposes. The kind of activity involved here is not indigenous to Indian custom or culture, nor a traditional Indian practice.[10] The tribal interest here is purely economic—the games have no purpose other than the production

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[10] In support of their motion for summary judgment in the district court, the State and County submitted a declaration by Professor William J. Wallace, professor emeritus of anthropology at California State University, who has done extensive anthropological work on the cultural life of California Indian tribes. Wallace, although acknowledging that Indians often aboriginally gambled for ceremonial, religious, and recreational puposes, concluded:

> "The Indians of California have often gambled intratribally and, on festive occasions, with other tribes. However, the Indians of California have not traditionally engaged in commercial gambling, or operated commercial gambling establishments. Also, the Indians of California have not, to any significant degree, traditionally engaged in gambling with non-Indians on either a commercial or non-commercial basis." Wallace Dec. 2 (CR 58, Exh. 16; JA 153).

Wallace further concluded:

> "A new development has been the establishment of commercial bingo parlors at several reservations. These tribally-run enterprises aim at attracting players from surrounding towns and cities by offering large cash prices . . . Undertakings of this sort find no precedent in native California Indian life and culture. The game itself (a lottery), the building of special gaming halls, tribally

of revenue—and the Tribes have no particular interest in the activity itself.

The Ninth Circuit below held that the tradition question turns not on whether the Tribes "have historically engaged in a particular activity," but on whether they are "engaged in a traditional governmental function." JS App. 11. According to the court, the Tribes here are "engaged in the traditional governmental function of raising revenue," *id.*, and this tribal interest "outweighs" the

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organized gambling and dependence on its revenue as an economic base, attempts to lure outsiders, particularly non-Indians, to play,—all these things fall well outside the boundaries of traditional native gambling." *Id.*, Report attached thereto, at 20-21 (JA 171).

The Tribes submitted a declaration by Professor Lowell Bean, another respected professor of anthropology, who differed with certain minor parts of Wallace's analysis. Bean Dec. 2-3, & Report attached thereto (CR 67; JA 206). Professor Bean, relying on the fact that Indians often gambled during religious and ceremonial festivals, concluded that the tribal bingo games are an "adaptation" of Indian gambling habits and customs. *Id.* at 2 (JA 209). Whether the bingo games are an "adaptation" of Indian gambling customs is a legal characterization rather than an anthropological fact, and the State and County disagree with Bean's legal characterization. More importantly, Bean does not disagree with Wallace's main conclusion, to the effect that the Indians of California have not traditionally conducted tribally-sponsored, high stakes commercial gambling operations that solicit and depend on non-Indian patronage. The district court, during oral argument on the motions for summary judgment, rejected the tribal argument that the gambling operations here are a "traditional" form of tribal activity. RT 4:10-22.

Professor A. L. Kroeber, a renowed anthropologist who studied the early culture of California's Indian tribes, observed that many Indians in California engaged in small-scale gambling with other Indians on festive occasions, such as dances or mourning ceremonies. A. Kroeber, *Handbook of the Indians of California*, published as Bulletin 78, Bureau of American Ethnology, at 848 (1925) (CR 58, Exh.1). Some games would require dexterity, such as schinny or lacrosse; others would involve chance, such as hand or stick, or dice. *Id.* at 846. The games, however, were conducted within the tribe, or, on some special occasions, with other tribes. *Id.* No mention is made of bingo or other lotteries being conducted on a commercial basis, particularly involving predominantly non-Indian participants. *Id.*

State's interest in protecting against intrusion of organized crime. *Id.* at 19. In short, the court held that the Tribes' economic interest outweighs the State's regulatory interest.

The Ninth Circuit analysis departs from modern federal Indian law, which focuses on the nature of the tribal activity rather than the tribal revenue-raising interest. In *Rice,* this court measured the tribal tradition in terms of the activity; the question was whether Indian tribes have traditionally regulated liquor sales, not whether they have profited from such sales. 463 U.S. at 720, 722, 725.[11] In *Colville*, this Court rejected the Tribes' "economic argument" that they have a sovereign right to market products more cheaply than non-Indian businesses. 447 U.S. at 154. The Ninth Circuit here, however, upheld the tribal economic argument rejected in *Colville,* and failed to even consider whether commercial gambling is a traditional form of tribal activity. Under the Ninth Circuit view, Indian tribes would have a sovereign right to market any commodity or contraband to non-Indians, no matter how much such marketing is outside that tribal tradition or illicit under state law. This result expands tribal sovereignty beyond its legitimate scope, and is not consistent with the "accommodation" of state, federal, and tribal interests that is the essence of modern federal Indian law. See *Rice,* 463 U.S. at 719, quoting from *Collville*, 447 U.S. at 156.

Indeed, the Ninth Circuit decision is inconsistent with the historic purposes of the reservation system itself. The reservation system was intended to provide Indians with a homeland for preservation of their traditional culture, and to separate them from non-Indians who were migrating westward. See *Matter of Heff,* 197 U.S. 488, 498 (1905); *Hopkins v. United States,* 414 F.2d 464, 467 (9th Cir. 1969). Its purpose was to allow Indians to

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[11] The Court stated that "the 'backdrop' in this case concerns the licensing and distribution of alcoholic beverages," 463 U.S. at 720; that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *id.* at 722; and that "the court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians." *Id.* at 725 (emphasis in the original.

live together, to create governmental and social organizations, to pursue agriculture, to hunt and fish, and even to commercially exploit the physical resources of the reservation. See, *e.g., Washington v. Washington State Commercial Vessel Ass'n,* 443 U.S. 658 (1979). Its purpose was *not* to convert Indian reservations into gambling havens for non-Indians who wish to circumvent state gambling laws, or to encourage Indians themselves to become a class of professional gamblers. Such, however, is the effect of the Ninth Circuit decision here. The lower decision, by allowing Indian tribes to establish gambling enclaves for the benefit of non-Indians, may well encourage a breakup of tribal culture rather than its preservation.

C. The State Interest

Under the balancing test, the state interest is highly relevant in determining the applicability of state laws on Indian reservations. *Rice,* 463 U.S. at 719, 724; *White Mountain Apache Tribe,* 448 U.S. at 144. In *White Mountain Apache Tribe,* this Court struck down state taxes as applied to non-Indian logging operations on Indian reservations, reasoning that the state had no "legitimate regulatory interest" other than to "raise revenue" and that the state had performed no services justifying such revenues. 448 U.S. at 150. In *Rice,* on the other hand, this Court upheld California's right to regulate liquor sales on Indian reservations partly because of the impact of such sales on legitimate state interests. 463 U.S. at 724.

California's interests are affected here in two different but related ways. First, as explained above, the tribal bingo games exploit California's gambling restrictions against non-Indians, thus undermining California's general policy against high stakes gambling. Second, as explained below, California gambling policy—which prohibits lotteries except where regulated by strict statewide standards—is intended to prevent organized criminal infiltration in California. The tribal games violate California's regulatory standards and thus create substantial risks of criminal infiltration. For these reasons, California's interests are strongly affected here.

1. California Gambling Policy

Under the common law of California, unregulated gambling is contrary to public policy and hence unlawful. *Bryant v. Mead,* 1 Cal. 441 (1851); *Carrier v. Brannan,* 3 Cal. 328 (1853); *Gridley v. Dorn,* 57 Cal. 78, 79 (1880); *Collins v. Lean,* 68 Cal. 284 (1885); *People v. Philbin,* 50 Cal.App.2d Supp. 859 (1942); *Tokar v. Redman,* 138 Cal.App.2d 350, 354 (1956). In the landmark *Bryant* decision, the California Supreme Court held that California common law on gambling follows the English common law as laid down by Blackstone, and thus that gambling is *malum in se.* 1 Cal. at 442. According to the Court, gambling is an "offense . . . mischievous to society," gambling houses are "public nuisances," and gambling wagers are contrary to "sound public policy." *Id.* at 442, 444. In *Carrier,* the California Supreme Court stated that gambling is "vicious and immoral in its nature, and ruinous to the harmony and well-being of society." 3 Cal. at 329. The Court also stated, however, that "the Legislature, finding a thirst to play so universally prevalent throughout the State, and despairing of suppressing it entirely, has attempted to control it within certain bounds by imposing restrictions and burdens upon persons carrying on this kind of business." *Id.* Thus, California common law, from *Bryant* to the present, regards gambling as a general vice subject to controlled legislative exceptions.

The California Constitution, following the common law, originally prohibited all forms of lotteries. Cal. Const., Art. IV, § 27 (1879), *as amended and renumbered,* Art. IV, § 19. The California Legislature, implementing the constitutional prohibition, has enacted a general scheme prohibiting lotteries. Cal. Pen. Code § 319, 320. In 1950, the people of California rejected a proposed constitutional amendment that would have authorized licensed gambling establishments. The ballot argument against the proposed amendment, which apparently persuaded a majority of voters, argued that legalized gambling would encourage the growth of organized crime.[12]

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[12] According to the opposing ballot argument, the amendment "would encourage big-time crime, civic corruption and juvenile delinquency and

In 1976, the people of California adopted a constitutional amendment that, although continuing the general prohibition against lotteries, authorized legislative approval of bingo games "only for charitable purposes." Cal. Const., Art. IV, § 19(c). The ballot argument supporting the amendment declared that charitable bingo, if properly regulated by the State, does not pose the risk of organized criminal growth that underlies the general constitutional ban against gambling.[13]

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make law enforcement tremendously more difficult;" the experience of other states "has shown conclusively that serious crime rackets have mushroomed when professional gambling was sanctioned;" and "big-time gangsterism" would result if the amendment were adopted. See Ballot Argument, Initiative No. 6, Proposed Amendments to the Constitution, General Election, Nov. 7, 1950 (CR 58, Exh. 3; JA 271, 272).

[13] According to the supporting ballot argument:

> "The enabling act . . . permits bingo games for charitable purposes where it is authorized by a local ordinance and conducted by nonprofit charitable organizations. All proceeds must be used for charitable purposes. *The statute . . . was written to preclude participation by the underworld.* The charitable organization running the game must be recognized as a charity and exempt from taxation by both State and federal government. The games must be conducted by members of the organization and no individual connected with the games can receive a salary, wage or profit from the conduct of such bingo games." California Voters Pamphlet, June 8, 1976, Primary Election, at 40 (CR 58, Exh. 5; JA 275) (emphasis added).

An Assembly Interim Committee commented on the proposed constitutional amendment in a similar vein:

> "The problem that California has faced on this subject is that legalization of bingo would not only permit legitimate organizations to participate, but would also allow introduction of persons and groups whose purposes are not as worthwhile. Unless *adequate standards* were established, the repeal of Article IV, Section 26 of the Constitution as it relates to bingo could lead to encouragement of *professional gambling*. For this reason there appears universal support for the position that if bingo were legalized only members of an organization in good standing would be allowed to operate the game for the organization in question." Report of the Assembly Interim Committee on Constitutional Amendments to the California Legislature, Part I, Assembly Interim Comm. Reps., 1961-63, v. 27, no. 2, at 13 (CR 58, Exh. 6; JA 280) (emphasis added).

After the constitutional amendment was adopted, the California Legislature enacted section 326.5 of the Penal Code, authorizing cities and counties to adopt ordinances permitting bingo games "only for charitable purposes." The provision contains numerous safeguards to protect against organized criminal infiltration. The games can be conducted only by charitable organizations; the games must be operated only by members of the charitable organization itself; profits must be kept in special fund accounts, and cannot be commingled with other funds; and jackpots cannot exceed $250.[14] The tribal bingo games violate all these provisions. The games are not conducted by charitable organizations; the games are not operated by members of the organization; profits are not kept in special fund accounts; and the tribal jackpots greatly exceed $250. Indeed, the tribal jackpots include cars, boats, pickups, and cash awards of thousands of dollars. See note 2, *supra*.[15]

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[14] More particularly, violations are punishable by fines not to exceed $10,000, which shall be paid to the general fund of the city or county. Cal. Pen. Code § 326.5(c). Minors are not allowed to participate in the games. *Id.* at (e). An organization conducting bingo games shall use only property owned by or leased to it, or which has been donated to it. *Id.* at (f). The bingo games must be open to the public, not just to members of the organization. *Id.* at (g). The games shall be operated and staffed only by members of the organization, and such members shall not receive any profit, wage or salary from the games. *Id.* at (h). Only the charitable organization itself may operate the games, or participate in their promotion or supervision. *Id.* No other organization may have a financial interest in the games. *Id.* at (i). All profits must be kept in special fund accounts, and cannot be commingled with other moneys. *Id.* at (j), (k). A portion of the profits, however, may be used for prizes, to pay overhead or rent, and to pay license fees. *Id.* at (k). If the profits exceed a specified level, the city or county may require a portion of the profits to be used for charitable purposes unrelated to the bingo games. *Id.* at (k) (4). A license fee, not to exceed $50, may be imposed by a city or county. *Id.* at (l). No person may participate in the bingo games unless he is physically present. *Id.* at (m). The total value of the prizes shall not exceed $250 for each game. *Id.* at (n).

[15] California authorizes two other forms of lotteries—horse-race betting and the State Lottery—but both are subject to strict statewide standards to prevent organized criminal infiltration. The horse-racing act provides for licensing of horse-racing operators; establishes fee sched-

The tribal bingo games create substantial risks of organized criminal infiltration that do not arise with respect to State-regulated charitable bingo. The tribal games feature high stakes that generate huge profits attractive to organized crime. The federal government does not regulate, monitor, or supervise the games, and no federal standards apply to the games. Indeed, the games are not even subject to uniform intertribal standards. Instead, each tribe adopts and administers its own standards, assuming that such standards are adopted at all. Moreover, the Secretary of the Interior does not always approve the tribal standards; he has not, for instance, approved the Cabazon games involved here. Cab. Stip. 5 (JA 64).

Additionally, the Indian tribes of California and elsewhere generally lack the law enforcement capability to ensure that the games are honestly run. The Cabazon Tribe here, for example, which has only 25 members, cannot undertake the screening and auditing procedures necessary to guard against criminal infiltration. See note 16, *infra*. Nor can the Tribe adequately handle the law enforcement problems arising when hundreds of non-Indians enter the reservation to play the games. *Id.* Indeed, Indian tribes lack criminal jurisdiction over non-Indian players. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). In short, tribal bingo creates serious risks of organized criminal infiltration

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ules; provides for disposition of revenues; limits racing to certain days; creates a State agency to administer the standards; and provides for local law enforcement of the standards. Cal. Bus. & Prof. Code §§ 19400-19667. The State Lottery, recently adopted by State initiative, establishes rules governing participation in the lottery, disposition of revenues, and selection of the lottery director and lottery retailers; establishes a lottery commission to oversee the lottery, whose members are appointed by the Governor and State Senate; and provides for enforcement of the standards by State and local law enforcement agencies. Cal. Govt. Code §§ 8880 *et seq.* The extensive regulation of both lotteries ensures that neither will be controlled by organized crime.

because the games feature high stakes and are not regulated, risks that do not arise concerning charitable bingo.[16]

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[16] The risk of organized criminal infiltration posed by tribal bingo games has been described more fully by a representative of the U.S. Department of Justice as follows:

> "The Department of Interior has estimated that nearly 80 tribes are conducting gambling operations, chiefly bingo, and that 20 to 25 of these are 'high stakes' operations, *some grossing up to $1 million monthly*. . . .
>
> "The sudden growth of these operations has generated concern in the law enforcement community. . . . The basis of the concern is the attraction that all lucrative gambling operations will have for organized criminal elements. The large amounts of cash act as a magnet and a source of potential corruption. . . .
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> "The attraction that high stakes gambling has for criminal elements should be readily apparent. . . . It involves a large number of fast moving cash transaction. The opportunities for "skimming" and "laundering" are enormous. Employees and managers can be corrupted into dishonest manipulations. Large-scale gambling operations require significant support services, such as security, food, cleaning, sanitation and transportation. Every one of these fringe operations can be lucrative and can attract racketeers who preserve their competitive edge by violence and intimidation. This has been the experience of legal gambling elsewhere. It has necessitated the creation of boards and commissions with pervasive supervisory authority, and even that has not always proved effective. . . .
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> "Although the tribes are recognized as governments, they do not have the authority or resources to police these types of activities. *The 25-member Cabazon Band . . . cannot adequately deal with the influx of hundreds of players.* Even larger tribes that could be said to be analogous to counties, do not have access to subpoena power or state criminal records that are just two of the many prerequisites to effective screening and auditing of a gambling operation . . . .
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> "The Interior Department is in no position to assume the needed regulatory role, which in many respects, would be inconsistent with its mission and function." See "Gambling on Indian Reservations and Lands," Hearing before the Select Committee on Indian Affairs, U.S. Senate, on S. 902, 99th Cong., 1st Sess. 143, 144 (1983) (testimony of Deputy Assistant Attorney General Mark M.

2. Organized Crime Studies

The Commission on the Review of the National Policy Toward Gambling ("National Gambling Review Commission," or "Commission"), established by Congress to study gambling in the United States, § 804, 84 Stat. 930 (1970), has declared that bingo is a highly regressive form of gambling that may potentially fall under the control of organized crime. The Commission has recommended that bingo, if legalized at all, should be subject to uniform standards adopted and enforced by the states. According to the Commission's final report:

> "Contrary to popular belief, bingo cannot be categorized as a parochial, low-stake game played by middle-aged and elderly women. *It is, rather, a billion-dollar industry* (much of it illegal) whose popularity permeates all aspects of American society, and the abuses of which often go undetected or unremedied." "Gambling In America," Report by National Gambling Review Commission (hereinafter "Nat. Gambling Review Comm'n Rep.") at 160 (CR 58, Exh. 7; JA 123-124) (emphasis added).

The report further states:

> "Bingo is one of the more regressive forms of gambling—that is, those in the lower income groups spend proportionately more of their income playing it than those in higher income categories." *Id.* at 163 (JA 130).

In describing the relationship of organized crime to bingo, the report states:

> "Despite bingo's popularity as a charity fundraiser and its reputation as a harmless pastime, it has been the object of abuse by a number of sources: Illegal parlors resort to tricks to circumvent the law or openly defy it. Racketeers are thought to control bingo games—legal and illegal—in a number of urban areas. Skimming and other scams are practiced by both organized groups and shady independent operators. . . .

Richard (CR 95, Exh. 21; JA 197, 198, 198-199, 201, 202) (emphasis added).

* * *

> *"Bingo takes in nearly $2 billion a year.* Laws regulating bingo games may be unenforced or ambiguous and it is easy to rake off substantial unreported amount of money taken in at the games. *Thus, it is apparent that national or local organized criminal groups would be interested in bingo as a source of illicit income." Id.* at 164 (JA 132, 133) (emphasis added).

The report concludes:

> "Because of bingo's pervasiveness and the income that it generates, *the Commission recommends that those States allowing bingo adopt and actively implement regulations to insure that the games are honestly run. . . ."*

* * *

> *"The office of the State Attorney General should be responsible for enforcing the regulations. . . ." Id.* at 166 (JA 138, 139) (emphasis added).

In 1967, the California Attorney General's Task Force on Legalized Gambling and Organized Crime also conducted a study of the relationship between gambling and organized crime. The Task Force concluded that states authorizing bingo had prevented organized criminal infiltration only by adopting and enforcing uniform, statewide regulatory standards. According to the Task Force's report:

> "In New York, bingo was legalized in 1958. With the advent of legalized bingo, racket minded promoters inevitably infiltrated vulnerable organizations and received the lion's share of the profits. The respectable name of the charity was used as a front and provided a buffer against legal prosecution. . . .

* * *

> "[T]he legalized game of bingo [in New York] was rifled with abuses, corruption, and violations of law. Another vice was the misappropriation of inestimable sums that were intended to support religious, charitable, and civic causes. . . .

* * *

> "Aside from a short period after the program's inception [in New York], stringent regulations and effective control have finally resulted in a successful endeavor which is devoid of the hoodlum element. . . ." Report by Attorney General Task Force, July 1, 1971, at 30-32 (CR 58, Exh. 8; JA 142-144).

The Task Force concluded that bingo, if legalized in California, should be played under "certain minimum standards" adopted by the State, that the standards should set "uniform state policy" regarding organizations qualified to conduct the games, and that the standards should provide for "licensing" of such organizations by local law enforcement officials. *Id.* at 33-34 (JA 144-145).

California thus has vital interests at stake here. California policy prohibits high stakes, unregulated gambling both on moral grounds and because such gambling creates a risk of organized criminal infilitration. The tribal games, which feature high stakes and are not regulated, create the very risk of criminal infiltration against which California policy guards. California's interests are frustrated if Indian tribes can establish zones of immunity where non-Indians can play high stakes bingo in defiance of State law. Under that result, California would become dotted with islands of Indian commercial gambling activity, thriving because of the "market" that California policy itself has created. The people of California, through their common law and constitutional policy, have chosen not to adopt Las Vegas-style gambling as a way of life. The people should have the right, through their elected representatives, to determine the kind of society in which they live. Thus, California's interests are significant here. Under the *Rice* balancing test, California's interests outweigh any competing tribal economic interests.[17]

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[17] The Ninth Circuit held that the State interest is "weak" because there is "no evidence" of organized criminal involvement in this case. JS App. 8. California's interest, however, lies in preventing organized criminal infiltration before it becomes an established fact, not simply correcting the problem after it occurs. It is harder to oust organized crime from an established operation than to prevent its establishment in

D. The Federal Interest

Under the common law balancing test, the federal interest is highly relevant in determining the applicability of state laws on Indian reservations. *Rice*, 463 U.S. at 725-735. In *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. 136, this Court, rejecting Arizona's attempt to tax non-Indian logging operations on Indian reservations, reasoned that Congress has adopted a "comprehensive" scheme regulating timber harvesting on Indian reservations; that the Secretary of the Interior has adopted extensive regulations governing timber harvesting; and that the U. S. Bureau of Indian Affairs (BIA) closely supervises such harvesting on a day-to-day basis. 448 U.S. at 145-148. "There is no room," the Court stated, "for these [State] taxes in the comprehensive federal regulatory scheme." *Id.* at 148. The State tax, it was stated, "would threaten the overriding federal objective" of the congressional scheme. *Id.* at 149. See also *New Mexico v. Mescalero Apache Tribe, supra*, 462 U.S. 324 (comprehensive federal and tribal regulatory fishing program preempts State laws as applied to non-Indian fishermen on Indian reservation); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982) (comprehensive federal regulation of Indian schools preempts State taxes as applied to construction of such schools).

By contrast, Congress has not authorized, directly or impliedly, Indian tribes to conduct commercial gambling operations that violate state laws. Further, the Secretary of the Interior and his representatives do not regulate, monitor, or supervise such operations. Indeed, the BIA has adopted regulations prohibiting gam-

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the first place. As a practical matter, a state often cannot detect organized crime unless it screens operators, audits books, and exerts the full force of its law enforcement apparatus. The Ninth Circuit decision prohibits all such forms of state action.

The State and County stipulated only that they "do not allege" the existence of organized crime here, not that organized crime does not exist. The State and County made this stipulation to ensure that the ultimate decision would not turn on specific facts that would limit the precedential value of the ultimate decision, particularly because, under our view, the existence of organized crime is not relevant to the jurisdictional question anyway.

bling "in any way whatever" on the premises of licensed Indian trader stores. 25 C.F.R. §§ 140.19, 140.21; see *Rice*, 463 U.S. at 736 (Blackmun, J., dissenting). This BIA prohibition may actually prohibit non-Indian operators from conducting the bingo games here. In any event, no federal regulatory scheme, "comprehensive" or otherwise, applies here. This case is bereft of the federal involvement and concern that has posed an obstacle to state jurisdiction over Indian reservations in other cases, such as *White Mountain*, *Mescalero*, and *Ramah*.

Indeed, as we explain more fully later, the Organized Crime Control Act (OCCA), 84 Stat. 937 (1970), 18 U.S.C. § 1955, prohibits gambling operations that violate state law. JS App. 25-26; see pages 41-42, *infra*. Thus, Congress, rather than preempting state gambling laws as applied on Indian reservations, has affirmatively authorized their application. The OCCA expresses federal gambling policy as clearly as 18 U.S.C. § 1161—which authorizes state regulation of liquor sales—expresses federal liquor policy. In *Rice*, this Court held that the latter provision supports the application of state liquor laws on Indian reservations. 463 U.S. at 725-735. Under the OCCA, the same conclusion follows respecting state gambling laws.

The Ninth Circuit held that modern federal Indian policy favors tribal self-sufficiency and economic development, and that this federal policy supports the tribal bingo games. JS App. 8.[18] Nothing in the federal policy favoring tribal economic development, however, suggests that this laudable goal should be achieved by non-traditional gambling operations that market exemptions from state law. In *Rice*, this Court held that "in the field of liquor regulation, we find no 'congressional enactments

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[18] The Ninth Circuit relied on a presidential policy statement and a declaration by an acting BIA official to support its conclusion that federal policy favors tribal economic development and thus supports the tribal interest here. JS App. 8. The presidential statement, however, does not suggest that the goal of economic development is to be achieved by gambling operations that violate state law. The statement by the acting BIA official cannot be considered an authoritative expression of federal policy, particularly in light of the absence of a federal regulatory scheme.

demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development,' " and that in this field "Indians cannot be said to 'possess the usual accouterments of tribal self-government.' " 463 U.S. at 724, quoting from *White Mountain Apache Tribe*, 448 U.S. at 143, and *McClanahan*, 411 U.S. at 167-168. Similarly, Congress has never expressed a policy favoring tribal economic development in the field of commercial gambling.

E. Card Games

Riverside County Ordinance No. 331 prohibits commercial card parlor games in all areas within the County's jurisdiction. Cab. Stip. 4-5, 7 (JA 62-63). Although California law does not directly prohibit the card games, see Cal. Pen. Code § 330, California law authorizes local governments to adopt more stringent gambling restrictions than those provided in State law. See *Remmer v. Municipal Court*, 90 Cal.App.2d 854, 856-857 (1949); *In re Farrant*, 181 Cal.App.2d 231 (1960). The Cabazon Tribe conducts three commercial card parlor games on its reservation: draw poker, lowball draw poker, and panguingue. Cab. Stip. 4-5, 7 (JA 62-63). The Cabazon card games violate the Riverside County ordinance.

The common law balancing test supports the County's right to prohibit the card games on the Cabazon reservation. The State interest is affected *not* by whether State law directly prohibits the gambling activity, but rather by whether the activity is regulated and controlled by State or local law enforcement authorities. The absence of State and local control, as noted earlier, creates a risk of organized criminal infiltration, and this risk occurs whether or not State law directly prohibits the particular activity. Thus, the Cabazon card games create a risk of criminal involvement that is contrary to California policy.

Moreover, the Cabazon Tribe is attempting to "market an exemption" from the County card parlor ordinance in the same sense that it is attempting to market an exemption from State bingo laws. Finally, the Tribe has not "traditionally" conducted card parlor games that solicit and depend on non-Indian patronage. See note 10, *supra*. For these reasons, the balancing test

supports the County's right to apply its ordinance to the card games.

II

PUBLIC LAW 280 AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

Although Congress has not generally spoken concerning whether state laws apply on Indian reservations, Congress has enacted a statute, Public Law 280, authorizing California and certain other states to exercise limited civil and criminal jurisdiction over Indian reservations. See 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360; JS App. 23-25. Generally, when Congress "comprehensively" regulates a subject matter, it "preempts" or displaces any federal common law that might otherwise apply. See, *e.g., Milwaukee v. Illinois, supra,* 451 U.S. at 313-314 (Congress has occupied field of water pollution control and thereby displaced federal common law remedies). Public Law 280, however, does not preempt or displace California's common law jurisdiction over Indian reservations, as such jurisdiction is defined by the common law balancing test applied in *Rice.* Public Law 280 was intended to broaden California's jurisdiction over Indian reservations, but not to deprive California of jurisdiction retained by non-Public Law 280 states. Therefore, as the Ninth Circuit properly held, Public Law 280 delegates certain authority to California, but does not preempt common law authority that might otherwise exist. JS App. 6-7, & n. 6. If the result were otherwise, California would have less jurisdiction over Indian reservations than non-Public Law 280 states, where such jurisdiction is supported by the common law but has not been specifically addressed in Public Law 280 itself. This result would conflict with the purpose of Public Law 280 to broaden California's jurisdiction over Indian reservations.[19]

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[19] This result would also conflict with *Rice* itself. In *Rice,* this Court applied the common law balancing test in holding that California—a Public Law 280 state—has the right to regulate liquor sales on Indian reservations. If Public Law 280 preempts California's common law

Since Public Law 280 does not preempt California's authority under the federal common law, this Court need not determine whether California has requisite authority under Public Law 280 if it concludes that California has such authority under the common law balancing test. The Court need determine the effect of Public Law 280 only if it determines that California's authority is deficient under the balancing test. Importantly, the common law and statutory aspects of the case must be analyzed separately. Assuming *arguendo* that California's authority is deficient either under the common law or the statute, it does not follow that its authority is deficient under the other.

A. Bryan's "Civil Regulatory-Criminal Prohibitory" Distinction

Public Law 280, which applies to California and certain other states, provides that "the *criminal* laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State," 18 U.S.C. § 1162(a), and that "those *civil* laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere in the State." 28 U.S.C. § 1360(a); JS App. 23, 24 (emphasis added).[20] In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court held

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authority, *Rice* would have erred in applying the balancing test. *Rice* can be sustained only on the premise that Public Law 280 does not preempt California's common law authority.

[20] The Assimilative Crimes Act (ACA), 18 U.S.C. § 13, which makes state laws applicable on federal lands, is made applicable to Indian reservations under 18 U.S.C. §§ 1152 and 1153. See *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950); *United States v. Marcyes*, 557 F.2d 1361, 1365 n. 1 (9th Cir. 1977). Public Law 280, however, expressly provides that 18 U.S.C. §§ 1152 and 1153 "shall not be applicable" in Indian country located within Public Law 280 states. 18 U.S.C. § 1162(c); JS App. 25. The apparent purpose of the exception is to ensure that Public Law 280 states have direct jurisdiction over Indian reservations, not simply to assimilate state laws into federal laws as applied on such reservations.

Federal law specifically prohibits the possession or use of "any gambling device" in Indian country. 15 U.S.C. § 1175. This provision is

that Public Law 280 does not authorize Minnesota, a Public Law 280 state, to apply its property tax laws on Indian reservations. In dictum, the Court stated that Public Law 280 includes state "criminal" laws but not state "civil regulatory" laws. *Bryan*, 426 U.S. at 390. The "civil regulatory-criminal prohibitory" distinction was dictum because the property tax laws involved in *Bryan* were not regulatory; they raised revenue but did not regulate conduct. Indeed, *Bryan* focused primarily on legislative history showing that Congress did not mean to authorize state "tax" laws to be applied on Indian reservations,[21] indicating that its focus was not on state regulatory laws.

In *Rice*, this Court cast doubts on *Bryan's* "civil regulatory-criminal prohibitory" distinction. The Court held that California, a Public Law 280 state, can *regulate* liquor sales by Indian sellers on Indian reservations. The Court cited *Bryan* only for the view that state "tax" laws are not included under Public Law 280, 463 U.S. at 734 n. 18, thus implying that state regulatory laws may be included. The Court expressed general disapproval of distinctions between state "substantive" and "regulatory" laws, *id.*, thus impliedly disapproving *Bryan's* distinction between regulatory and non-regulatory laws.

Indeed, after *Rice*, *Bryan* creates an anomaly concerning state regulatory jurisdiction over Indian reservations. In *Rice*, this Court held that states can apply their regulatory laws on Indian reservations, assuming that the balancing test supports this result. In *Bryan*, on the other hand, the Court stated in dictum that Public Law 280 does not authorize state regulatory laws to be applied on Indian reservations under any circumstances. The anomaly arises because Public Law 280 was intended to *broaden*

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apparently inapplicable here because bingo does not involve the use of a gambling "device."

[21] The Court noted the "total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to *tax* Indians or Indian property on reservations," 426 U.S. at 381 (emphasis added), and noted that the House hearings on Public Law 280 "strongly suggest that Congress did not mean to grant *tax* authority to the State." *Id.* (emphasis added).

state jurisdiction over Indian reservations, but *Bryan* interpreted the statute as conferring *less* jurisdiction than states already have under the common law balancing test applied in *Rice*. In other words, a federal statute intended to broaden state jurisdiction actually confers less jurisdiction than already exists under the common law.

This Court should resolve the anomaly by making clear that *Bryan* applies only to state tax laws, and by rejecting the *Bryan* dictum that state regulatory laws are not included under Public Law 280. The common law balancing test applied in *Rice* allows for full and fair consideration of both state and tribal interests; the *Bryan* dictum, which absolutely prohibits the application of state regulatory laws, does not. If tribal interests are sufficiently worthy to prevail over state interests, or if state interests are relatively insignificant, the balancing test will adequately protect tribal interests and the *Bryan* distinction is unnecessary for that purpose. If, on the other hand, state regulatory interests are substantial and tribal interests marginal, the balancing test allows for proper accommodation of these interests and the *Bryan* dictum does not. Thus, the balancing test, not the *Bryan* distinction, provides for the "accommodation" of competing interests that underlies modern federal Indian law. See *Rice*, 463 U.S. at 719, quoting from *Colville*, 447 U.S. at 156.

This conclusion is supported by the specific language of Public Law 280 itself. Subdivision (b) thereof provides:

> "Nothing in this section . . . shall authorize *regulation* of the use of such [tribal] property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; . . ." 18 U.S.C. § 1162(b), 28 U.S.C. § 1360(b) (emphasis added).

Thus, Public Law 280 prohibits state regulatory laws on Indian reservations only where inconsistent with specific federal laws—treaties, agreements, statutes, or regulations—and not, as stated in *Bryan*, in all cases. This result is consistent with the balancing test applied in *Rice*, which holds that state laws are inapplicable if preempted by federal laws. *Rice*, 463 U.S. at 725. *Bryan* did not consider the effect of subdivision (b) because

Bryan did not involve state regulatory laws. The Ninth Circuit here held that California's gambling laws are not inconsistent with or preempted by any federal laws, JS App. 7, which indicates that California laws are not inconsistent with any federal "treaty, agreement, . . . statute, or . . . regulation" within the meaning of subdivision (b). Therefore, Public Law 280 directly authorizes the application of California's laws here.[22]

This conclusion is also supported by the legislative history of Public Law 280. On June 29, 1953, shortly before Public Law 280 was enacted, the U.S. Department of the Interior transmitted a report to the House Committee on Interior and Insular Affairs regarding H.R. 1063, the bill that became Public Law 280. Report from U.S. Dept. of Interior (CR 58, Exh. 14; JA 146). The Interior report recommended that H.R. 1063 be amended to provide that state "civil laws . . . of general application" are applicable on Indian reservations, and explained the reasons for the proposed change as follows:

> "The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, *not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as those laws are of general application to private persons or private property.* The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs

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[22] In a pre-*Bryan* decision, a federal district court in California held that, under Public Law 280, a county ordinance prohibiting commercial card games applied to tribal card games conducted on an Indian reservation. See *Rincon Band v. San Diego County*, 324 F.Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds*, 495 U.S. 1 (9th Cir. 1974). The district court specifically held that the county ordinance was not inconsistent with a federal "treaty, agreement, . . . statute, or . . . regulation" within the meaning of Public Law 280. 324 F.Supp. at 377-378.

> or ordinances are not inconsistent with the applicable State laws." *Id.* at 2-3 (JA 149) (emphasis added).

The Interior report's proposed change was included in the bill finally approved by Congress. Therefore, Public Law 280 was meant "not merely to permit the State courts to adjudicate civil controversies" arising on Indian reservations, but also to provide for the application of state "substantive civil laws" on reservations. Read in conjunction with the provision in subdivision (b) excepting state laws that "regulat[e] . . . the use of" Indian property only under defined circumstances not applicable here, the Interior report makes clear that Congress contemplated no distinction between state "regulatory" and "prohibitory" laws. The Interior report was not mentioned in *Bryan*.

Indeed, it is often difficult to determine whether state criminal laws are "regulatory" or "prohibitory" because many criminal laws contain both regulatory and prohibitory aspects. Professor Cohen, commenting on the distinction, has stated:

> "[A] distinction between the two is often difficult to draw. For example, is a hunting law 'prohibiting' the taking of more than the bag limit of an animal regulatory or prohibitory." F. Cohen, *Handbook of Federal Indian Law*, at 295 n. 110 (1982 ed.).

Similarly, are state traffic laws that prohibit drivers from exceeding certain speed limits regulatory or prohibitory? What classification applies to state liquor laws prohibiting minors from consuming alcoholic beverages? The classifications are difficult because such state laws regulate social conduct by selectively prohibiting certain kinds of conduct. They require conformance with certain social standards by prohibiting and penalizing nonconformance. Thus, in a sense, virtually all prohibitory laws are "regulatory," for they achieve social goals by prohibitory means. To classify them as one way or the other involves an often arbitrary exercise that loses sight of the objective of the criminal scheme itself.

B. Application of the Bryan Distinction

Alternatively, if Bryan's "civil regulatory-criminal prohibitory" distinction is valid, California's gambling laws are essentially "prohibitory" rather than "regulatory" and thus are included under Public Law 280. California law prohibits all forms of lotteries except where specifically authorized by law. Cal. Pen. Code § 320. Thus, California law prohibits bingo, although an exception is provided for charitable bingo. *Id.* at § 326.5. The purpose of California's general lottery ban is to prevent organized crime from establishing or gaining control of gambling operations in California. See pages 22-26, *supra*. The exception for charitable bingo is based on the legislative judgment that charitable bingo, if subject to adequate regulatory safeguards, does not pose the risk of organized criminal infiltration associated with the kind of high stakes, unregulated bingo involved here. Therefore, California absolutely prohibits a specific form of conduct—high stakes, non-charitable bingo—rather than licenses or regulates it. Additionally, criminal sanctions are imposed for violations of California's gambling laws. Cal. Pen. Code §§ 320-324, 326, 330. For these reasons, California's gambling laws are prohibitory within the meaning of *Bryan*.

The Ninth Circuit ruled otherwise, following earlier decisions of the Fifth Circuit and Ninth Circuit. See *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). According to the Ninth Circuit, California bingo laws are "civil regulatory" because the proscribed conduct does not violate California "public policy," in that California authorizes bingo for charitable purposes. JS App. 4.[23]

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[23] It is doubtful that the Ninth Circuit's "public policy" test properly differentiates between state "civil regulatory" and "criminal prohibitory" laws, even assuming the validity of the distinction. The test is illusory because all state laws—whether "regulatory" or "prohibitory"—are based on state "public policy," and their violation impairs state interests to some degree. The test allows federal courts to substitute their judgment of state "public policy" for the state legislative judgment, a

The Ninth Circuit apparently assumed that a state law is "civil regulatory," and that state "public policy" is not violated, if the state provides an exception from a general prohibition against criminal conduct. The assumption is a mechanical one because it focuses on the form of the state criminal scheme rather than its purpose and effect. The purpose of the California legislative scheme is to prohibit high stakes, unregulated gambling that will attract organized crime; an exception is provided for low stakes, regulated charitable bingo because it poses no risk of criminal involvement. See pages 22-26, *supra*. Thus, the "public policy" inquiry, assuming its relevance, turns on whether the State regulates and controls the activity—because such regulation and control relate directly to the organized crime risk—and not on whether the State provides an exception that creates no organized crime risk. The distinction is not, as the Ninth Circuit held, between commercial and charitable bingo, but between regulated and unregulated bingo.

The Ninth Circuit's mechanical analysis compounds the difficulties, mentioned earlier, concerning the difficulty of distinguishing between state prohibitory and regulatory laws. Under the Ninth Circuit analysis, many classically prohibitory laws may be construed as "regulatory" because they provide exceptions. For instance, state statutes prohibiting intentional homicide provide exceptions for homicide committed in self defense; state statutes prohibiting narcotic use provide exceptions for medically-controlled narcotic use; and state statutes prohibiting fireworks provide exceptions for publicly-controlled fireworks displays.[24] Although such state prohibitions are clearly "prohibitory," the Ninth Circuit's mechanical analysis suggests the opposite conclusion. The Ninth Circuit analysis illustrates the difficulties arising

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result that Congress obviously did not contemplate. Indeed, *Bryan* itself did not suggest a "public policy" test. The test should be rejected, assuming that the *Bryan* distinction is otherwise retained.

[24] The Ninth Circuit held in an earlier case that state fireworks statutes are "criminal prohibitory" under the *Bryan* analysis, notwithstanding that exceptions are provided for publicly-controlled fireworks displays. See *United States v. Marcyes, supra*, 557 F.2d 1361. This decision is difficult to reconcile with the Ninth Circuit analysis here.

from the prohibitory-regulatory distinction and the general irrelevance of the distinction in measuring state and tribal interests. California's gambling laws are clearly "prohibitory," assuming the relevance of the classification, and are not rendered less so by an exception for charitable bingo that creates no organized crime risks.

III

THE ORGANIZED CRIME CONTROL ACT AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

The Organized Crime Control Act (OCCA) prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." 84 Stat. 937 (1970), 18 U.S.C. § 1955; JS App. 25-26. Thus, the OCCA, by its terms, makes state gambling laws applicable on Indian reservations.[25] As noted earlier, the OCCA expresses a federal policy favoring the application of state gambling laws on Indian reservations, as federal policy is relevant under the common law balancing test applied in *Rice*. See page 31, *supra*. Additionally, the OCCA makes state gambling laws directly applicable on Indian reservations, apart from the balancing test. Thus, the OCCA is relevant concerning both the common law and statutory aspects of the case.

The Ninth Circuit held that the OCCA does not apply here because California's gambling laws are "civil regulatory" in that the tribal bingo games do not violate State "public policy." JS App. 6. In effect, the court extended *Bryan's* "civil regulatory-criminal prohibitory" distinction to the OCCA. Nothing in the OCCA or its legislative history, however, supports the distinction.

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[25] The OCCA applies only to large-scale gambling operations, for it is limited to (1) operations involving five or more persons, and (2) "substantially continuous" operations that last for more than thirty days or that have a gross revenue of more than $2000 in any day. 18 U.S.C. § 1955(b). The tribal bingo operations here meet these limitations and are thus large-scale operations for purposes of the OCCA.

The Ninth Circuit simply borrowed the distinction from *Bryan*—apparently as an unarticulated principle of federal common law—even though *Bryan* involved a different statute addressing a different subject matter. This Court in *Rice* rejected an analogous "substantive-regulatory" distinction in construing a federal liquor statute—18 U.S.C. § 1611—stating that "in the absence of a context that might possibly require it, we are reluctant to make such a distinction." *Rice*, 463 U.S. at 734 n. 18. The Ninth Circuit displayed no such reluctance in extending the distinction to the OCCA. The distinction should be rejected because it is supported neither by the OCCA nor its legislative history. Additionally, the tribal bingo games are contrary to California "public policy," see pages 22-26, 40-41, *supra*, and thus the OCCA applies here in any event.[26]

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[26] The Sixth Circuit recently rejected the "civil regulatory-criminal prohibitory" distinction as applied to the OCCA. See *United States v. Dakota, et al.*, No. 85-1568 (6th Cir., filed July 18, 1986). The court specifically disagreed with the Ninth Circuit decision here relating to the OCCA issue. Slip Op. 7 n. 6. The Sixth Circuit decision, not the Ninth Circuit decision, comports with the congressional intent underlying the OCCA.

The State of Michigan joined with the United States in bringing the *Dakota* action in the federal district court, but was dismissed by the district court on grounds that states lack jurisdiction to prosecute OCCA violations. *Id.* at 2, & n. 1. Since Michigan did not appeal the dismissal order, *id.*, the Sixth Circuit did not decide the jurisdictional issue, although in dictum it appeared to agree with the district court analysis. *Id.* at 5.

In our view, states have jurisdiction to enforce the OCCA, or at least to make arrests for OCCA violations. Under the Supremacy Clause, U.S. Const., Art. VI, § 2, "the Constitution, laws and treaties of the United States are as much the part of the laws of each state as its own local laws and constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880). Accordingly, state officers have general authority to apply and enforce federal laws except where federal law provides otherwise. See *Marsh v. United States*, 29 F.2d 172, 173-174 (2d Cir. 1928) (state officers have authority to make arrests for violations of federal prohibition laws); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (state officers have authority to enforce federal immigration and naturalization laws); *People ex rel. Happell v. Sischo*, 23 Cal.2d 478,

CONCLUSION

The paramount question here is whether the Tribes' interest in raising revenue outweighs the State's interest in regulating the conduct of its non-Indian citizens. The Tribes have no particular interest in the activity itself; their sole interest is in raising revenue. The State, on the other hand, has a distinct interest in regulating its non-Indian citizens; State policy prohibits the high stakes, unregulated games that attract non-Indian patrons here. State policy is based on the need to protect against organized criminal infiltration in California.

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491 (1943); 67 Ops. Cal. Atty. Gen. 331, 334 (1984). This line of authority supports California's right to directly enforce the OCCA.

Even if California has the right only to make arrests for OCCA violations but not to directly prosecute such violations, California's authority must be sustained here, for California's authority is challenged only insofar as California makes arrests. That is, California does not attempt to prosecute OCCA violations in this case. Rather, the Tribes' complaints seek declaratory and injunctive relief to restrain State and local officials from making arrests. JA 28, 34-35, 40, 44.

The State cannot effectively protect its interests if Indian tribes can provide gambling havens for non-Indians who seek refuge from state gambling laws. The tribal games flagrantly exploit State gambling policy, and are profitable only because they do so. The "accommodation" of state, federal, and tribal interests that underlies modern federal Indian law supports the application of State and local laws here. Therefore, this Court should reverse the lower decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,

Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a state law and a local ordinance regulating the operation of bingo games, and a local ordinance prohibiting certain card games that are permitted under state law, can be applied to prevent federally-recognized Indian tribal governments from conducting such games on their reservations, where those activities are sanctioned by the Department of the Interior and provide the sole source of revenue and the main source of employment for the tribes?

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OPINION BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit is reported at 783 F.2d 900.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §1331, 1343(3) and 1362.

This Court does not have jurisdiction over this appeal under 28 U.S.C. §1254(2). Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984). The Order of the district court, as affirmed by the court of appeals, held that the state and local laws at issue in this case "are of no force and effect" on the tribal reservations, and that the appellants "are without authority or jurisdiction" to attempt to enforce them. See Order reprinted in Appellants' Jurisdictional Statement, Appendix at A-13 to A-14. As in Silkwood, the statutes themselves were not struck down in this case; the court only invalidated an attempted exercise of authority purportedly made under the state and local laws. Unlike the cases cited by the appellants, including Ohio Civil Rights Comm'n. v. Dayton Schools, 477 U.S. ___, 91 L.Ed.2d 512 (1986), the court below did not find the statutes unconstitutional either facially or as applied. Instead, it found that the appellants had no lawful authority to attempt to apply the statutes at all. As a result, 28 U.S.C. §1254(2) does not confer appellate jurisdiction in this case.

STATEMENT OF THE CASE

1. INTRODUCTION

Although this case involves only two Indian tribes, the importance of Indian bingo to tribes elsewhere in the country cannot be overlooked. There are currently between eighty and one hundred tribes operating bingo games nationwide. These tribal activities were begun in response to substantial cuts in federal funding for Indian programs and President Reagan's Indian Policy Statement of January 24, 1983, which "encouraged the tribes to reduce their dependence on Federal funds by providing a

greater percentage of the cost of their self-government." H.R. Rep. No. 488, 99th Cong. 2d Sess. 10, 12 (1986) (hereafter "H. Rep. 488").

The Department of the Interior regards tribal bingo as an appropriate means by which tribes can fulfill this federal policy objective. Joint Appendix (J.A.) 219, 243. As a result, the Interior Department has been actively involved in supporting and promoting tribal bingo activities. It has approved tribal bingo ordinances, H.Rep. 488 at 10, and has provided some $8 million in direct grants and loan guarantees to tribes for the construction of bingo facilities. 132 Cong. Rec. S.12017-18 (daily ed. Aug. 15, 1986) (statement of Senator Andrews). Revenues from tribal bingo activities are being used to fund a wide variety of important tribal programs and services, and the games provide significant employment opportunities for economically depressed reservations. Id.; see also, Gambling on Indian Reservations and Lands, Hearing before the Senate Select Committee on Indian Affairs, 99th Cong. 1st Sess., June 26, 1985, pp. 320-350 and 595-603.

Every federal court to have addressed the issue, including the court below, has upheld the right of Indian tribes to sponsor bingo games free from state jurisdiction.[1] In turning to bingo in order to raise governmental

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[1] Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982); Barona Group of the Capitan Grande Band v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983); Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wisc., 1981); State of Washington v. Hatch, C-83-1518R (W.D. Wash., Aug. 14, 1984), appeal dismissed (9th Cir., Feb. 21, 1985); Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Indian Country U.S.A. v. State of Oklahoma, Nos. 85-C643-E (N.D. Ok., April 24, 1986); Seneca-Cayuga Tribe v. Oklahoma, No. 85-C-639-9 and 86-C-393-B (N.D. Ok., June 5, 1986), 13 Indian L. Rep. 3103; Lac du Flambeau Band v. Williquette, 629 F.Supp. 689 (W.D. Wis. 1986).

revenues, the tribes have responded as have many states, including California, which have recently turned to state lotteries, numbers games and other forms of gambling as a convenient form of voluntary taxation. On many reservations, the jobs and revenues that bingo is providing are giving tribes their first real chance at economic self-sufficiency. The loss of this opportunity would be devastating not only to the Cabazon and Morongo Bands, but throughout Indian country generally.

2. STATEMENT OF FACTS

The Morongo Band of Mission Indians (hereinafter the "Morongo Band") and the Cabazon Band of Mission Indians (hereinafter the "Cabazon Band") are both federally recognized Indian tribes.[2] Their reservations are held in trust by the United States and consist of more than 32,000 and 1,700 acres of land, respectively, in the desert region of Southern California. Neither reservation has any known natural resources to generate revenue for the operation of its tribal government or for the provision of services to or employment for its members.

The Morongo Band authorized the establishment of its tribal bingo enterprise to provide its members with jobs and to raise revenues with which to provide governmental services. Among the Band's more than 730 enrolled tribal members, the unemployment rate was in excess of sixty-four percent prior to the commencement of bingo. 86 I.D. 680, 681-682 (1979). Less than one square mile of the reservation, is suitable for economic development. Id.

On April 23, 1983, the Morongo Band adopted a Tribal Bingo Ordinance authorizing and regulating bingo

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[2]Unless otherwise noted, all facts contained herein are taken from the two Agreed Statements of Unconverted Facts filed in district court. See J.A. 59 (Cabazon); J.A. 78 (Morongo).

on the reservation.[3] That Ordinance has been approved by the Secretary of Interior. See Appendix A. Through its short-term management agreement, a bingo hall was built on tribal land, the tribe receives not less than seventy-five percent of the revenues, and the Band is actively involved in the formulation and implementation of all management and operational policies of the enterprise. J.A. 92. This management agreement was approved by the Secretary of the Interior pursuant to 25 U.S.C. § 81. J.A. 216.

The tribe has now employed 101 Indians, taking most members off welfare or unemployment and making jobs available to every tribal member able or willing to work. In the first seven months of operation alone, the payroll paid to tribal members and their spouses exceeded $490,000, making many self-supporting for the first time.[4]

The Cabazon Band is governed by Articles of Association which were approved by the Secretary of the Interior on April 13, 1965, and which empower the General Council "to manage the economic affairs of the Band and to establish and operate such commercial enterprises as it may deem to be for the benefit of the

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[3]The Ordinance restricts the use of the revenues to "the support of programs to promote the health, education and general welfare" of the Band. It is intended that the funds will enable the Band to improve living conditions on the reservation, to repair, modernize and maintain the reservation water system, to build a center and establish programs for senior citizens, to establish pre-school and day care programs for the children of members, and to provide other necessary governmental services.

[4]See Gambling on Indian Reservations and Lands, Hearing before the Senate Select Committee on Indian Affairs, 99th Cong. 1st Sess., June 25, 1985, pp. 251-279, (Testimony of Robert Martin, Morongo Tribal Chairman).

Band." Pursuant to these powers, on February 9, 1980, the Cabazon General Council enacted Tribal Ordinance No. 5.6 regulating bingo games on the Cabazon Reservation[5] and on May 24, 1980 enacted Tribal Ordinance No. 5.7, regulating card clubs on the Cabazon Reservation.[6] The Cabazon card room has been in operation since October, 1980. See Cabazon Band of Mission Indians v. City of Indio, 694 F.2d 634 (9th Cir. 1982). Its bingo enterprise was opened in March, 1983. Although it previously utilized an outside management firm for its bingo operation, the Cabazon Band recently terminated that agreement. See Appendix C.

The revenues from these enterprises are the sole source of funds to operate the tribal government or to provide tribal services and programs on the Cabazon Reservation.[7] In addition, the enterprises provide employment opportunities for all tribal members and members of their families that need jobs, particularly those with the fewest job skills and the least chance for

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[5]Ordinance 5.6 authorizes and regulates the playing of bingo and provides that all "net revenues shall be used for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes." This Ordinance has been approved by the Secretary of the Interior. See Appendix B.

[6]J.A. 68. Ordinance 5.7 authorizes the establishment of a card club on the reservation to be owned and operated by the Cabazon Band and authorizes only the playing of draw poker, lowball draw poker, and panguingue, games not prohibited by California Penal Code §330. See discussion below at 47.

[7]J.A. 256. The funds are used to provide a private health insurance program for tribal members and their families; a reservation security force; extension of basic utility services to the reservation; traditional funeral and mourning ceremony expenses; upkeep of the tribal cemetery; and establishment of a tribal court system.

employment elsewhere. Without these sources of revenue, the Cabazon Band could not maintain a viable tribal government. J.A. 260.

The appellants do not allege that either tribal bingo enterprise or the Cabazon card room were or are associated with organized crime. J.A. 66, 84. The Court of appeals held that "there is no evidence whatsoever that organized crime exists on these reservations". 783 F.2d at 904.

3. ANALYSIS OF CALIFORNIA BINGO LAW

The California Constitution, Article IV, §19, provides that "the legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes." Pursuant to this authorization, the Legislature has enacted California Penal Code §326.5 which defines and regulates some aspects of bingo games.

The tribal bingo games at issue here differ from state-authorized bingo in only two ways. First, the tribes make more extensive use of salaried personnel, in that one of the primary purposes of operating the games is to provide employment opportunities on their reservations. In addition, the game prizes sometimes exceed $250. While the prizes awarded by the tribes are sometimes greater than those allowed under state law, it should be noted, however, that the average prize awarded per game at the Cabazon Reservation for a representative four-month period in 1984 was $184.89. J.A. 267. An analysis of the prizes awarded at Morongo produced similar results.

With these two exceptions, the tribal bingo games are operated in virtual conformity with the requirements of Penal Code §326.5. Indian tribes are non-taxable government entities.[8] Each tribe's ordinance prohibits the

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[8] IRS Revenue Rulings 67-284 (1967) and 81-295 (1981); see, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

participation of minors in the bingo games. Each tribe conducts its bingo games in halls owned by the tribe on tribal property. Both the Morongo and the Cabazon bingo enterprises are required by their respective tribal ordinances to "be open to the public", not just to members of the tribe; a requirement analogous to that of §326.5(g). Separate accounts are maintained for the bingo operations by each tribe and the proceeds are used for charitable/governmental purposes, administrative expenses, overhead, security, and the prizes. Both tribes prohibit the participation by persons not physically present when the game is being conducted.

It is significant that Penal Code §326.5 does not limit the number of games which an eligible organization may operate, the number of games which any participant may play, the amount of money which any participant may spend, the admission price to participate, the total receipts or expenditures of the bingo operations of an eligible organization, the number of organizations which are eligible to conduct bingo games, or the advertising of bingo games; nor does the Code define "charitable purposes" for which the money must be spent. In fact, under §326.5(k)(4) if the gross bingo proceeds of an organization are less than $5,000 per month, all of the proceeds can be used for running the bingo games, with no other charitable purpose required.

Most important, the California laws do not regulate the playing or participation in bingo games; instead, only the operators of games--in this case the Morongo and Cabazon Bands-- are regulated. 783 F.2d at 904. Members of the public are absolutely free to participate whenever, wherever and to whatever degree they choose. See also Seminole Tribe v. Butterworth, 658 F.2d at 316.

SUMMARY OF ARGUMENT

The analysis of this case must begin with the well-established principle that absent express congressional authorization, states have no jurisdiction over Indian tribes on the reservations. Such jurisdiction cannot be

obtained through amorphous principles of federal common law and was not granted under PL-280. Because the incidence of the California bingo laws falls directly upon the tribes themselves and because there is no statute giving appellants the jurisdiction which they seek, the cases upon which appellants rely are inapposite.

The federal common law "balancing test," through which appellants seek jurisdiction over the tribes, has only been applied by this Court to review state assertions of jurisdiction over non-Indians on the reservation. To apply this test to the tribes here would require a radical departure from this Court's precedents and a reveral of 150 years of federal Indian law and policy.

Even assuming arguendo that this test applied herein, the tribes would prevail nevertheless. In applying the common law to determine whether states have jurisdiction over non-Indians on the reservations, this Court has held that there are two independent but related barriers, either of which standing alone is sufficient to bar state jurisdiction: infringement on the right of tribal self-government and preemption by federal law, regulation and policy. Under either formulation, a particularized inquiry in this case demonstrates that the federal and tribal interests in support of tribal bingo are strong, while the state interest is speculative and weak.

Moreover, there is no statutory basis for the jurisdiction claimed by the appellants in this case. PL-280 neither gives jurisdiction over the tribes themselves nor makes civil regulatory laws applicable on the reservations. The Organized Crime Control Act (OCCA) is a federal criminal statute which does not give appellants jurisdiction to enforce their civil regulatory laws on the reservation. The OCCA also expressly exempts non-profit bingo. Therefore, questions regarding the scope of the OCCA are not properly before the Court because of issues of standing, ripeness and justiciability.

Finally, the appellants do not have jurisdiction to apply a county ordinance to prohibit the operation of the

Cabazon tribal card room. That enterprise is identical in all respects to hundreds of other card rooms operating elsewhere in California, including at least five others in Riverside County.

ARGUMENT

I. THE APPELLANTS' RELIANCE ON COLVILLE AND RICE IS MISPLACED

The appellants place heavy reliance on Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) and Rice v. Rehner, 463 U.S. 713 (1983). Upon careful analysis, however, it is apparent that both cases are readily distinguishable from the factual and legal issues presented here, and that neither case can justify the unprecedented reach of state jurisdiction over the tribes for which the appellants argue.

In Colville, this Court held that the State of Washington could assert concurrent taxing authority over tribal cigarette sales to non-Indians. However, Colville permitted only the application of Washington's cigarette tax, the legal incidence of which specifically fell on the non-Indian purchasers. Washington's separate tobacco products tax could not be imposed, because the legal incidence of that tax fell directly on the tribal sellers. 447 U.S. at 139, n.2; see also Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 475 (1976) (prohibiting application of State taxes where the legal incidence fell on tribal members).

In contrast to the tax permitted in Colville, the legal incidence of the state and local bingo laws at issue here falls directly on the tribes. California's statutory bingo scheme is directed at, regulates and controls only the organization sponsoring the bingo game, not the individual bingo players. 783 F.2d at 904. In Colville, unlike here, there was "no direct conflict between the State and tribal [taxation] schemes." 447 U.S. at 158. Here, appellants claim the right to shut down these tribal enterprises

completely. Colville plainly did not contemplate or authorize such direct state control of tribal affairs.

Beyond these distinctions, Colville is inapposite for at least two other reasons. In that case, the Court did not hold that because the tribes were marketing an exemption from state tax laws, that the state could prohibit the tribes from engaging in the activity. Instead, the Court merely found that the revenue interest of the tribes did not outweigh the competing state revenue interests because the value being marketed was "not generated on the reservations by activities in which the tribes have a significant interest," id. at 155, and because the tribes did not have a "vested right" to any such sales. Id. at 151, n.27. In the present case, neither of these limiting conditions is present. First, even the appellants have conceded that the recreational activities being provided by the tribes in this case constitute "value generated by on-reservation activities." 783 F.2d at 906. The tribes here are offering recreational opportunities in large, permanent facilities which they have built; operate and regulate the games under tribal ordinances; provide ancillary services, including security protection, to their patrons; and use the revenues derived to provide on-reservation services to their members. In these respects, this case is far closer to New Mexico v. Mescalero Apache Tribe, 462 U.S. 336, 343 and n.26 (1983) (hereafter Mescalero), than to Colville. Second, the Tribes here do have a "vested right" to conduct bingo games with non-member participants. This right is "vested" in the sense that tribal bingo games have been expressly authorized, sanctioned, funded, and promoted by the federal government. See pages 22-26, below. Under these circumstances, the tribes here are not merely marketing an exemption from state tax laws, but have a federally-recognized "vested right" to sponsor bingo games on their reservations for the purpose of raising needed tribal revenues.

Rice v. Rehner, 463 U.S. 713 (1983) is also readily distinguishable from the case now before the Court. Rice involved the interpretation of 18 U.S.C. §1161, a statute

not relevant here, which provides that liquor may be sold on Indian reservations "in conformity both with the laws of the state" and with a tribal ordinance. Based on §1161 and its legislative history, the Court concluded that a state could require a licensed Indian trader operating a store on a reservation to obtain a state liquor license because that statute was an express congressional delegation to the state of concurrent authority over liquor sales. While the appellants place heavy emphasis on Rice, the tribes believe that there are at least three compelling reasons why Rice has no direct bearing on the issue presented in this case.

First, the Rice decision is, by its very terms, limited to the particular question of liquor licensing under 18 U.S.C. §1161. 463 U.S. at 723. Second, one of its principle underpinnings was the fact that in the particular context of liquor licensing, the Court found no "firm federal policy of promoting tribal self-sufficiency and economic development." Id. at 724. In this case, current federal policy promotes tribal economic development and recognizes tribal bingo enterprises as a legitimate means by which tribes can achieve that goal. Third, the Court made it clear that its narrow decision in Rice does not call into question and is not inconsistent with Bryan v. Itasca County, 426 U.S. 373 (1976), holding that PL-280 is not a grant of general civil regulatory authority to the states. 463 U.S. at 734, n.18. Thus, Rice was not fashioning broad new principles but rather was addressing a narrow issue under a specific federal statute. See H.Rep. 488 at 11.

Even if Rice may be of some limited applicability to this case, the appellants have seriously misread that decision. They characterize and discuss Rice as if it were a "balancing of the interests" case, rather than being based on an express statutory grant of authority to the states. Appellants' Brief (hereafter "App. Br.") 7; 16, n.9; 33, n.19. This position is plainly wrong. 463 U.S. at 715 ("Congress has delegated authority to the States"), at 726 ("Congress authorized . . . State regulation"). As a result, Rice does not support the appellants' principal

argument that the State can exercise regulatory jurisdiction over the tribes themselves in the absence of a congressional grant of such authority.

Nor does Rice or Colville broadly hold that principles of tribal self-government can never be implicated when the state's assertion of jurisdiction affects non-Indian activities on the reservation. App. Br. 13-14. This Court's holding in Mescalero clearly refutes any such contention.

Moreover, this Court has repeatedly recognized that current federal Indian policy strongly supports the twin goals of strengthening tribal self-government and promoting reservation economic development. See, e.g., Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. ___, 85 L.2d. 200, 205 (1985); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 and n.10 (1980). These goals are intended to be complementary, for, as President Reagan noted, "without sound reservation economies, the concept of self-government has little meaning." Statement by the President, Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983). However, the only way that Indian tribes can achieve economic self-sufficiency and reservation development is through commercial interaction with the non-Indian community. No Indian tribe, no matter how resource-rich its reservation, can hope to develop its economy by marketing goods and services only to its own members. As a result, it would be contradictory, indeed, for this Court to hold that Indian tribes can achieve economic self-sufficiency only by giving up their powers of self-government. Yet, appellants argue for a broad holding that tribal self-government can never be infringed when the state seeks to assert jurisdiction over activities on the reservation in which non-Indians are participants. The Court rejected this argument when raised in a governmental context in Williams v. Lee, 358 U.S. 217 (1959), and it should be rejected here, too.

Finally, the appellants find fault with the court of appeals' analysis of "tribal tradition", as discussed in Rice. They contend that there is no tribal "tradition" of

commercial gaming with non-Indians on these reservations, and that absent such an historical record, the State is authorized to regulate these tribal activities. App. Br. 17-20. This argument is wrong both as a matter of fact and law.

The appellants rely upon a declaration and report submitted by Professor William Wallace, of California State University. J.A. 152-172. Although Professor Wallace notes that gambling was a "favorite preoccupation" of California Indians, id. at 154, and "intensive gambling characterized practically all inter-village or tribal gatherings," id. at 168, he concludes that Indians did not engage in commercial gambling and did not "traditionally" engage in gambling with non-Indians. Id. at 153.[9]

Far more authoritative is the declaration and report of Dr. Lowell Bean, Professor of Anthropology at California State University at Hayward, who has lived on the Morongo Reservation, conducted extensive original ethno-historical research, and has published extensively on Cahuilla Indian culture, which includes both the Cabazon and Morongo Bands. J.A. 206-215. According to his report, "gambling has at no time in the history of the Cahuilla peoples ceased as a significant activity, including today." Id. at 210. Dr. Bean continued that the tribes "received monies and/or goods for services provided to visitors or participants who came to gamble, wager, or observe gaming" and that once Indians interacted with

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[9]Professor Wallace's report and opinions were restricted to aboriginal or prehistoric California Indian cultures (i.e. before Indian contact with non-Indians), which he characterizes as the "traditional" period. C.R. 91; Excerpt of Record (EOR) 555-56. Therefore, using Dr. Wallace's definition, it would be impossible for Indians to have "traditionally" gambled with non-Indians, because "traditional" activities were practiced only before Indian/non-Indian contact. Kroeber, too, reports on this early period.

non-Indians in the Spanish, Mexican and American periods, non-Indians were encouraged to participate in gambling games, which included card and dice games and horse races. Id. at 210-213. Dr. Bean concluded from his nearly 30 years of research on the Cahuilla that the Cabazon and Morongo tribal bingo enterprises are

> a present day adaptation of the traditional ways of the Cahuilla people, e.g., the use of tribal lands for gaming, recreation, and generating an income from gambling and spending by outsiders for the benefit of the reservation.

Id. at 209.[10] Thus, there is, in fact, a well-recognized "tribal tradition" of gambling between Indians and non-Indians on the Cabazon and Morongo Reservations.

Despite having made this showing, we do not believe that the Court intended in Rice that a tribe would be required to demonstrate a clear historical record of engaging in a particular activity in order to assert tribal powers of self-government over that activity today. We believe, instead, that Rice, simply requires an inquiry to determine whether tribal self-government over a general subject area has historically been statutorily divested. In the particular context of liquor transactions discussed in Rice, there was a unique federal-state-tribal legal relationship dating from colonial times and a specific statute conferring jurisdiction on the states to regulate the subject area. Thus, the Court was justified in finding a congressional divestiture of tribal self-government.

The legal tradition of tribal self-government is far different with regard to gaming. "There are vast histor-

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[10]When deposed, Professor Wallace acknowledged that his report covered an earlier time period than Dr. Bean's, and that he had "no reason to dispute" Dr. Bean's findings and conclusions as to Cahuilla tribal gambling since the end of the 18th Century, the time of Western contact. C.R. 91, EOR 548, 555.

ical differences in the manner that the United States has treated alcohol and gaming activities in Indian country," and "there is no specific or general federal law conferring authority on states to regulate gaming" on Indian reservations. H.Rep. 488, at 11-12. Thus, because the facts here are the opposite of those in Rice, the court below was fully justified in finding that raising tribal revenues by means of bingo games was a legitimate governmental activity, without the need for a comprehensive historical analysis of ancient Cahuilla gambling practices. If such an inquiry were required under Rice, every case involving tribal jurisdiction would be reduced to a battle of anthropological experts, quibbling over historical minutia.[11]. It would also call into serious question the many federal and state court decisions upholding tribal self-government in areas that were clearly not "traditional" tribal activities. See, e.g., Red Lake Band of Chippewa Indians v. Minnesota, 248 N.W.2d 722 (1976) (vehicle registration); Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning).

Finally in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. ____, 83 L.Ed.2d 1016, 1031 (1985), decided two years after Rice, the Court rejected as "unsound in principal and unworkable in practice" any analysis of state governmental authority based on notions of "historical tradition." Equally applicable in this context, the Court found that using a historical approach "prevents a court from accommodating changes in the historical functions of States" and "results in line drawing of the most arbitrary sort." Id. at 1029. Based on Garcia, and the discussion above, we believe that a narrow reading of the "tribal tradition" analysis in Rice, as provided by the court below, is both necessary and appropriate.

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[11]To accept appellants' argument would forever relegate Indians to the status of dip-net fisherman, living in tepees and selling baskets by the side of the road. Moreover, it would negate all of the federal legislation of the last twenty years directed at making Indians economically self-sufficient.

II. THE COMMON LAW BALANCING TEST CANNOT BE APPLIED TO GRANT APPELLANTS JURISDICTION IN THIS CASE

A. Absent Specific Congressional Authorization, States Have No Jurisdiction Over Indians

In no case has this Court ever authorized the direct assertion of state jurisdiction over a tribe on its reservation in the absence of a treaty or statute expressly conferring such authority. Here, however, the appellants ask the Court to ignore this immutable principle of federal Indian law and to grant them jurisdiction though the application of a federal common law balancing test. Although common law principles have been applied to give states jurisdiction over non-Indians on the reservation, they have never been applied where, as here, the state seeks jurisdiction over the tribe itself. As this Court has said, "state laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 170-171 (1973). This Court continued in McClanahan by stating that "cases applying the Williams [common law balancing] test have dealt principally with situations involving non-Indians." Id. at 179. The argument advanced by appellants ignores the critical distinction which this Court has preserved regarding the applicability of state laws to Indians, as opposed to non-Indians, on the reservations. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980). It also ignores the basic principle that "tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States." Colville, 447 U.S. at 154.

Although in the past 150 years the absolute barrier to state jurisdiction found in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), has been modified in some respects, this Court has uniformly held that a state lacks jurisdiction over Indians in Indian country in the absence of an Act of Congress expressly conferring such jurisdiction. McClanahan, 411 U.S. at 168; see also

Williams v. Lee, 358 U.S. 217, 220 (1959); White Mountain, 448 U.S. at 144, 151, 252; Montana v. Blackfeet Tribe of Indians, 471 U.S. __, 85 L.Ed. 2d 753, 759 (1985).

In this case, the State is asserting jurisdiction over the activities of tribes on their reservations.[12] However, "there is no specific or general Federal law conferring authority on States to regulate gaming activity within Indian country." H.Rep. 488 at 11-12; Cabazon, 793 F.2d at 904, n.7.Because Congress has not expressly granted such jurisdiction, this effort is barred under the basic principles espoused in McClanahan and its progeny.[13]

B. Public Law 83-280 Bars The Application of Federal Common Law

The appellants have correctly noted that "Congress can 'preempt' or displace the [federal common law] balancing test by enacting legislation defining state jurisdiction over Indian reservations." App. Br. 11. Congress has, in fact, done so by the enactment of Public

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[12]Appellants raise for the first time in their brief the suggestion that the tribes' non-Indian employees may be regulated by the state, even if the tribal activities are immune from state jurisdiction. However, tribal employees share the tribes' immunities. Davis v. Littell, 398 F.2d 83 (9th Cir., 1968), cert. den. 393 U.S. 1019 (1969). Moreover, because this issue was not raised or adjudicated in the lower courts, the Court need not address it here. Cardinale v. Louisiana, 394 U.S. 437 (1969).

[13]The McClanahan court, at 167-168, specifically distinguished cases relied upon by appellants herein such as Organized Village of Kake v. Egan, 369 U.S. 60 (1962), and Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), saying that these cases involved non-Indians, off-reservation activities of a tribe, or off-reservation Indians not possessing the "usual accoutrements of tribal self-government."

Law 83-280, 67 Stat. 588 (1953), 18 U.S.C. §1162, 28 U.S.C. §1360.

This Court has recently held that PL-280 "was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation, providing for all effected States to come within its terms." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. _____, 90 L.Ed.2d 881, 890 (1986). This Court found that North Dakota's statutes were preempted because they were inconsistent with PL-280. In enacting PL-280, Congress determined the full extent to which the State of California could exercise its jurisdiction on Indian reservations. PL-280 made state law applicable to civil causes of action, but did not make general state civil regulatory laws applicable on the reservation and did not extend jurisdiction over the activities of the tribes themselves. Where, as here, Congress has acted statutorily, the states cannot seek to expand their authority through amorphous principles of "federal common law." Milwaukee v. Illinois, 451 U.S. 304, 314-315 (1981); 19 Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction §4514, 220 (1982 ed.). To hold otherwise, would permit the Court to ignore Congress' determination and would render PL-280 a nullity. This would be particularly inappropriate here, in that Congress is recognized to exercise plenary authority over Indian affairs, "not subject to be controlled by the judicial department of the government." Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

Directly on point is Kennerly v. District Court, 400 U.S. 423 (1971). Faced with Montana's argument that it could assert jurisdiction over a reservation without complying with the statutory requirements of PL-280, this Court found that argument unpersuasive, because the state's attempted assumption of jurisdiction was not in compliance with the PL-280, a "governing Act of Congress." 400 U.S. at 427. Similarly appellants here seek to obtain jurisdiction greater than they obtained under PL-280, through common law principles which would be inconsistent with PL-280. As this Court did in Kennerly,

McClanahan, and Three Affiliated Tribes, the Court should find that PL-280 statutorily bars any such effort.[14]

Appellants incorrectly argue that giving PL-280 such preemptive effect would result in PL-280 states having less jurisdiction than non-PL-280 states. App. Br. 9. This Court has never upheld state jurisdiction over tribes or reservation Indians if not obtained in compliance with PL-280 or some other applicable federal statute. Rice, 463 U.S. 713; McClanahan, 411 U.S. at 178; Kennerly, 440 U.S. at 424-25. Therefore, the "anomaly" complained of by the appellants is simply non-existent.

III. ASSUMING ARGUENDO THAT FEDERAL COMMON LAW APPLIES, STATE JURISDICTION CANNOT BE AUTHORIZED HERE

In applying the federal common law to assertions of state jurisdiction over non-Indians on the reservation, the Court has looked to what it has called the two "independent but related barriers" of federal preemption[15] or infringement upon the right of tribal self-government.[16] These two barriers "are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable." Ramah, 458 U.S. at 837. It is in applying the "infringement" and "preemption" tests to assertions of state jurisdiction over non-Indians on the reservation that this Court engages in a particu-

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[14]Although the court below did not find state jurisdiction preempted by federal law, it did not have the benefit of this Court's analysis of PL-280 in Three Affiliated Tribes.

[15]See, e.g., McClanahan 411 U.S. 164; White Mountain, 448 U.S. 136; Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982).

[16]See, e.g., Williams v. Lee, 398 U.S. 217 (1959); Fisher v. District Court, 424 U.S. 382 (1976).

larized inquiry and balances the respective interests of the federal, tribal, and state governments. White Mountain, 448 U.S. at 145; Ramah, 458 U.S. at 838. In the balancing process, this Court has uniformly held that the deeply engrained notions of Indian sovereignty and self-government must serve as the "backdrop" against which vague federal enactments must be measured. White Mountain, 448 U.S. at 143; Ramah, 458 U.S. at 837; Rice, 463 U.S. at 719.

In arguing that the federal common law supports state jurisdiction, appellants urge this Court to ignore every federal court decision on the issue of Indian bingo and follow two state court decisions. Those decisions, Penobscot Nation v. Stilphen, 461 A.2d 478 (Me.) appeal dismissed 464 U.S. 923 (1983).[17] and Oklahoma v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985)[18] are readily

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[17]Although the Maine Supreme Court reached an opposite result, it did so on the basis of the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. 1721-1735 and Maine legislation implementing that Act. 461 A.2d at 487, 489. That court recognized that the relationship between Indians in Maine and the State was unlike that which exists anywhere else in the United States and specifically distinguished the Seminole and Barona cases from its holding on the basis of this Act. That court also found it important that Maine law generally prohibited the playing of bingo. Finally in discussing the federal common law, the court premised its analysis on a flawed belief that tribal sovereignty over non-Indians had been divested and applied only to internal tribal matters. Id. at 487. Therefore, the decision's rationale can be of no persuasive value herein.

[18]Since the Oklahoma Supreme Court decision was rendered, two federal district courts in Oklahoma have reached a contrary conclusion and found the state to be without jurisdiction over tribal bingo activities. See n.1, above. In the most recent, Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, Nos. 85-C-639-B and 86-C-393-B (N.D. Okla., June 5, 1986), 13 Indian L.Rep.

(footnote continued)

distinguishable from the instant case and do not provide persuasive reasoning for this Court to follow.

A. Federal Law Preempts State Jurisdiction Over The Tribes' Bingo Enterprises

Even if the Court should conclude that it is appropriate to apply the "balancing test" in this case, it should find that the attempted assertion of state jurisdiction has been preempted by federal law.

In Indian affairs, principles of preemption developed in other areas of the law are "generally unhelpful." White Mountain, 448 U.S. at 143. The cases have rejected a narrow focus on congressional intent, or a requirement of an express congressional enactment in order to find a state law preempted. Mescalero, 462 U.S. at 334. Instead, when federal regulatory schemes and the policies underlying them would be impaired by state action, state jurisdiction may be preempted. Three Affiliated Tribes,

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[18](footnote continued)
3103, the federal district court concluded that the State Supreme Court decision was "contrary to federal law." Id. at 3104. The court quoted Carol Goldberg-Ambrose, the noted authority on PL-280, who had termed the Oklahoma Supreme Court's reasoning "obscure and confused." Id. The federal court held that the State had no "residuary jurisdiction," for the limits of state jurisdiction over Indians were established by PL-280 which "preempts and reserves to the Federal government or the Tribe jurisdiction not so granted." Id. at 3105. Because the state law was being applied to Indian conduct, as here, the Oklahoma Supreme Court improperly "'allowed state jurisdiction to seep into the area preempted by PL-280.' Goldberg-Ambrose supra." Id. The state court also overvalued "ill-defined" state interests while erroneously giving "little or no weight to Tribal and Federal interests." Id. Thus, the federal court enjoined the enforcement of the Oklahoma Supreme Court decision. The Tribes urge this Court to adopt this analysis as persuasive.

90 L.Ed.2d at 892; White Mountain, 448 U.S. at 144-45. Because state jurisdiction in Indian country restricts tribal self-government, "broad preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty." Cohen, Federal Indian Law 278 (1982 ed).

The Tribes contend that state regulation of tribal bingo has been preempted by federal law, by a comprehensive federal regulatory scheme and federal policy. These will be discussed in detail in this section to demonstrate to the Court that, even if the preemption test were applicable, the Tribes would prevail. Thereafter, we will address the "infringement" test, and demonstrate that under either test, the federal and tribal interests outweight those of the state. To avoid repetition, a single analysis of the applicable state interests and the balancing of those interests will be presented in the "infringement" section.

1. State Law is Preempted by Current Federal Indian Policy

Central to the proper disposition of this case is the fact that Indian tribal bingo is actively sanctioned and promoted under current federal Indian policies, which encourage and foster tribal self-government and promote reservation economic development. 783 F.2d at 904; see Mescalero, 462 U.S. at 324. The federal government's continued commitment to these goals was recently emphasized by President Reagan. J.A. 220-228.

The court of appeals correctly concluded that tribal bingo games were "recognized as one way to support this policy," 783 F.2d at 904, relying on a March 2, 1983 policy directive of the Assistant Secretary of the Interior (tribal bingo "should be protected and enhanced"), J.A. 243-44, and the affidavit of Theodore Krenzke, Director of Indian Services, Bureau of Indian Affairs, on behalf of the United States Department of the Interior (tribal bingo

furthers federal goals of tribal self-determination and economic self-sufficiency). Id. at 905; J.A. 218-220.[19]

Current federal policy with respect to tribal bingo activities has also been clearly expressed in recent congressional hearings on H.R. 1920, 99th Cong. 1st Sess (1985) and related Indian gaming legislation.[20] In hearings before the House Interior Committee in November 1985, the Interior Department witness testified that that Department would oppose "state control over bingo because it would drive Indian bingo out of business" while the law enforcement risks are "manageable and do not warrant state regulation." Testimony of Marian Blank Horn, Principal Deputy Solicitor, Department of the Interior, November 14, 1985. More recently, a Department of Justice official testified in support of proposed legislation that would leave tribal bingo activities under federal and tribal jurisdiction. Statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, Before the Senate Select Committee on Indian Affairs, June 17, 1986.[21]

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[19]Because the Department of the Interior is statutorily charged with the formulation of Indian policy and the management of Indian affairs, 25 U.S.C. §§1, 2, 2a, 13, its determinations are entitled to great weight and substantial deference. Udall v. Tallman, 380 U.S. 1, 16 (1965); People, State of California v. U.S., 561 F.2d 731, 733-34, and n.4 (9th Cir. 1977).

[20]H.R. 1920 was passed by the House of Representatives on April 21, 1986 and sent to the Senate. 131 Cong. Rec. H2012. The Senate Select Committee on Indian Affairs favorably reported the bill, as amended, to the full Senate on September 17, 1986. Senate action is now pending.

[21]Despite this fact, the appellants persist in citing outdated 1984 testimony which they erroneously claim shows federal opposition to tribal bingo. App. Br. 26, n.16.

H.R. 1920 itself is also significant in that it expressly rejects any notion that states have or should have any regulatory authority over tribal bingo activities.[22] After recognizing the economic benefit to tribes from bingo, Representative John McCain (R-Az), a co-sponsor of the bill, noted that

> Traditionally, states and Indian Tribes have been adversaries, as our committee hearings clearly demonstrated. State witnesses wanted state jurisdiction, regulation, enforcement and taxation. However, no state witness testified that the State had a responsibility to Indian Tribes for their health, welfare or economic development.

132 Cong. Rec. H2021 (daily ed. April 21, 1986); see generally, United States v. Kagama, 118 U.S. 375 (1866).

As the foregoing demonstrates, current federal Indian policy supports tribal attempts to become economically self-sufficient through bingo, in much the same way that state governments are turning to lotteries and other forms of gaming to raise revenues. Federal policies such as these were found to be relevant in preempting state jurisdiction over non-Indians in White Mountain, 448 U.S. at 149; Ramah, 458 U.S. at 840; and Merrion, 455 U.S. at 137. These policies should carry even more preemptive weight when the activities of the tribes themselves are at issue.

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[22] Although H.R. 1920 has only been passed by the House and by the Senate Committee at this time, recently this Court quoted extensively from and was guided by the factual record in a Senate Committee Report on legislation that was never enacted. Walters v. National Association of Radiation Survivors, 473 U.S. _____, 87 L.Ed.2d 220, 234, n.10 (1985). Similar deference is warranted here, where the findings are based on extensive Committee hearings. H.Rep. 488, at 24.

2. State Jurisdiction is Preempted by the Exercise of Federal Statutory and Regulatory Authority

In addition to the policies discussed above, the federal government has also exercised significant oversight responsibilities with respect to tribal bingo. Contrary to appellants' contentions that the Secretary of the Interior plays no role in these operations, the Secretary has exercised substantial regulatory authority over tribal bingo activities. On April 7, 1986, the Assistant Secretary for Indian Affairs issued and distributed to every tribal government in the United States detailed guidelines requiring departmental review and approval of tribal bingo management contracts. Copies of these materials are appended at pages 61a to 70a of Appellees' Motion To Dismiss Appeal. These guidelines require, inter alia, an FBI investigation and background check on all non-Indian bingo management personnel for the express purpose of prohibiting criminal infiltration into any tribal bingo enterprise. These guidelines were promulgated pursuant to the Secretary's authority, under 25 U.S.C. §81, to approve all contracts with Indian Tribes.

In addition to these guidelines, the Secretary of the Interior has been extensively involved in regulating tribal bingo activities. He has approved tribal bingo ordinances, including those of the Cabazon and Morongo Bands, see Appendices A and B, as well as the Morongo bingo management agreement. J.A. 216. The Secretary has also approved leases of tribal land for gaming purposes under his authority to regulate the use of tribal lands pursuant to 25 U.S.C. §§177, 415, and 25 C.F.R. Part 162. See H.Rep. 488 at 13. Pursuant to his authority under the Indian Finance Act, the Secretary has issued loan guarantees and federal grants of approximately eight million dollars for the purpose of constructing facilities for Indian gaming on reservations. See 132 Cong. Rec. S12017; see also Mashantucket Pequot Tribe v. McGuigan, 626 F.Supp. at 246. Also, at 25 C.F.R. § 11.58, the Secretary has made the violation of tribal gaming laws by

an Indian punishable in the federal Courts of Indian Offenses.

Finally, additional preemptive weight is provided by the Mission Indian Relief Act, 26 Stat. 712 (1891). This legislation was passed by Congress to establish reservations for the Mission Indians in California. Both reservations herein were established under this Act. J.A. 61, 80. Section 3 of the Act provides that the reservations so established would be held in trust "for the sole use and benefit of the band or village" for which they were established. Such exclusivity language preempts the operation of state law on the reservations. McClanahan, 411 U.S. at 176, n.15; United States v. Farris, 624 F.2d 890, 894 (9th Cir.) cert. denied 429 U.S. 1111 (1980).

The cumulative effect of these preemptive factors closely parallels those relied on in Mescalero. As in that case, the Secretary's extensive and direct involvement with the tribes in the field of bingo preempts conflicting state jurisdiction. As noted there, it would have been "highly unlikely" for the Secretary to have "established, financed, and participated" in these activities if the state were "free to nullify the entire arrangement" 462 U.S. at 340. In addition, the Court found that in that case state jurisdiction would undermine reservation self-government and threaten the federal commitment to tribal self-sufficiency and economic development. Id. at 341. These same factors apply with equal, if not greater, preemptive force in the case now before the Court.

B. State Jurisdiction Unlawfully Infringes on the Right of Tribal Self-Govermment

In their zeal to obtain a reversal in this case, the appellants have seriously misrepresented both the specific holding of the court below, and the grounds on which that decision was based. They state: "according to the court, the tribes have a 'sovereign' interest in raising revenues - regardless of the form of 'activity' by which

the revenue is raised...." App. Br. 13 (emphasis added).[23] In fact, the court of appeals did not state or suggest that tribes had a right to raise revenues by any means whatsoever. The court held that under its "particularized inquiry" into the specific facts and interests asserted in this case, the tribes had a strong governmental interest in raising revenues by means of bingo games, and that this was a legitimate governmental interest regardless of whether the tribes had raised revenues in this precise manner in the past. 793 F.2d at 906.

The appellants also incorrectly state that this result was based on an impermissible use of "tribal sovereignty as an absolute bar to State jurisdiction, rather than as a 'backdrop' in analyzing the preemption issue." App. Br. 13. What the appellants have ignored, however, is the fact that the lower court stated that its decision was based on "interference with reservation self-government," 783 F.2d at 904, 906, one of the two independent but related barriers to the assertion of state jurisdiction on an Indian reservation.

Although the tribes believe that the balancing test is not required because the appellants are not seeking to regulate the activities of non-Indians, the court of appeals conducted a particularized inquiry into the federal, tribal and state interests involved here. The court concluded that the federal and tribal interests outweighed that of the state. For the reasons discussed below, that ruling was correct and should be affirmed if this Court finds that the balancing test applies in this case.

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[23] Later, they state ominously that "[u]nder the Ninth Circuit view, Indian tribes would have a sovereign right to market any commodity or contraband to non-Indians, no matter how much such marketing is outside that tribal tradition or illicit under state law." Id. at 20. While such hyperbole certainly grabs the reader's attention, it bears little serious relationship to the holding of the court below, which neither requires nor presages any such result.

1. The Federal and Tribal Interests Are Strong

Above, at pages 22-26, we have discussed the interests of the federal government that support and promote these tribal bingo enterprises. We need not repeat them here, other than to note that the court of appeals found these federal interests in support of tribal bingo to be strong. 783 F.2d at 905.

The interests of the tribes mirror those of the federal government, and are equally compelling. As the court below found, these games are the sole source of tribal revenues and the major source of employment on the Morongo and Cabazon reservations. Id. Without the revenues provided by these activities, the tribes would have no funds to operate their governments or provide services to their members. Id. At issue here, then, is the literal survival of these two small Indian tribes.

In recent years, the Court has shown an increasing appreciation for the need of tribal governments, like all governments, to raise revenues for essential programs and services. In Colville, the Court characterized the power to tax as "a fundamental attribute of sovereignty." 447 U.S. at 152. Two years later, it explained that this was so "because it is a necessary instrument of self-government...[which] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." Merrion, 455 U.S. at 137. In Mescalero, the Court found the state could not assert jurisdiction over non-Indian sportsmen on the reservation, at least in part because such jurisdiction "would threaten Congress' overriding objective of encouraging tribal self-government and economic development" by terminating a tribal enterprise that "generates funds for essential tribal services and provides employment for members who reside on the reservation." 462 U.S. at 341. Most recently, the Court recognized that tribes "can gain independence from the Federal Government only by financing their own police force, schools and social programs." Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. __, 85 L.Ed. 2d 200, 205 (1985).

The court of appeals found that raising revenues by means of tribal bingo was a legitimate governmental function exercised by these tribes.[24] That conclusion was fully consistent with the interests of the federal government, which seeks to make tribes less dependent on federal funds, and the cases quoted above, which recognize revenue generation as an essential and vital element of tribal self-government. As a result, the court was correct in finding that the tribal interests involved in this case were "compelling." 783 F.2d at 905.

2. The State Interest Is Weak

By comparison, the interest of the appellants in prohibiting tribal bingo activities is speculative and therefore weak. The state relies solely on one claimed interest: preventing the potential for organized crime involvement in the tribal games. As the court below noted, this is a legitimate concern. 783 F.2d at 904. However, as this Court has noted, legitimate state concerns must give way in the face of overriding federal and tribal interests. Three Affiliated Tribes, 90 L.Ed.2d at 895. This is such a case.

It must be recognized that we are dealing here solely with a potential and not an actual threat. After extensive hearings, the House Interior Committee found no evidence of organized crime in any Indian bingo enterprise anywhere in the country. H.Rep. 488 at 10. In this case, appellants stipulated to the fact that they are not alleging any organized criminal involvement in the Cabazon or Morongo enterprises. J.A. 66, 84.

Second, and more important, the appellants fail to recognize that the tribes and the federal government

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[24] We doubt that the State can dispute this general proposition, in view of the fact that California is raising hundreds of millions of dollars annually by actively encouraging its citizens to gamble on the new State lottery.

share a substantial interest in keeping the tribal bingo games free from criminal involvement. To this end, the federal government brings an impressive array of resources which it can use to prevent or prosecute criminal involvement in tribal bingo activities. E.g., 15 U.S.C. §1175; 18 U.S.C. §§483; 1163; 1955; 1961 et. seq. The federal government has shown no hesitancy to use these resources against criminal gambling activities on Indian reservations. United States v. Dakota, 796 F.2d 186 (6th Cir. 1986); United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. Blackfeet Tribe, 364 F.Supp. 192 (D.Mont. 1973).[25] To guard against any possible criminal infiltration, the Secretary of the Interior also requires an FBI background investigation of all individuals with ownership or managerial interests in bingo management agreements.

In addition, the tribes are able to effectively regulate these activities on a day-to-day basis. Without any basis in fact, the appellants contend that their interest is great because the tribes cannot "adequately handle the law enforcement problems arising when hundreds of non-Indians enter the reservation to play the games." App. Br. 25. The Court rejected a very similar argument in Mescalero. 462 U.S. at 342, n.27. Moreover, the contention merely underscores the appellants' misunderstanding of the activities in question. At issue here are people out for an evening's entertainment to play bingo, not drug-crazed motorcycle outlaws bent on mayhem and destruction. The appellants' own undercover agent described the players on a typical night at the Cabazon Reservation in these terms:

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[25]These cases involved illegal casino gambling, or the use of prohibited gambling devices. Because of the current federal policies supporting tribal bingo as a legitimate means of raising revenues, the Department of Justice has never sought to prohibit or prosecute a tribal bingo enterprise.

> On row 5, on the front left side were a middle-aged Latin couple, who were later joined by two young Latin males. These men had to have the game explained to them. The middle table was shared with a senior citizen couple. The aisle table had 2 elderly women, 1 in a wheelchair, and a middle-aged woman. . . . A goodly portion of the crowd were retired age to senior citizens.

J.A. 176. The "law enforcement problems" posed by such people are not substantial, and in over five years of operation, the Cabazon Band has not experienced a single serious criminal incident involving a patron at its bingo parlor or card room. The experience at Morongo has been identical. Nonetheless, both the Cabazon and Morongo Bands maintain sizeable security forces in and around their tribal enterprises. Additionally, in June, 1986, the Secretary of the Interior commissioned Cabazon Security Chief Bruce James as a Deputy Special Officer, with complete federal police powers over a number of southern California Indian reservations, including Cabazon and Morongo.[26] His presence will provide additional protections against any possible criminal involvement in the tribal bingo activities.

The State's interest here is also relatively weak because there are no "off-reservation effects that necessitate State intervention." Mescalero, 462 U.S. at 342. This is not a case like one involving fireworks, Marceyes, or alcoholic beverages, Rice, in which a commodity can easily be taken off the reservation and cause bodily harm to members of the general population. Like the fishing and hunting activities in Mescalero, the bingo games are confined solely to the reservations, and

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[26]The commission and position description outlining his rights and responsibilities are attached hereto as Appendix D, and show Officer James' authority to investigate, apprehend and arrest violators of federal, tribal, state and local laws on these reservations.

there are simply no off-reservation impacts caused by these activities.

The contention that California's general gambling policies are frustrated or undermined by the operation of the tribal bingo games is simply a make-weight argument and finds no basis in the record. Although appellants contend that California's "common law" regards gambling as a general vice, they well know there is no "common law" with respect to gambling in California; gambling is regulated entirely by statute. Monterey Club v. Superior Court, 119 P.2d 349, 358 (1941); People v. Harris, 12 Cal. Rptr. 916, 919 (1961). In addition, California's general gambling policies are not implicated in this case because it does not deal with gambling in general. It involves only bingo and three specific card room games: activities that are permitted under state law and widely played by the people of California. Finally, despite its pious pronouncements, it is important to note that California not only makes commercial gambling widely available to its residents, through race tracks and card rooms, but it is now itself in the gambling business, by operation of the new State Lottery. Thus, its argument against tribal bingo based on "moral grounds," App. Br. 29, is somewhat hypocritical.

In Mescalero, this Court stated that "when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose." 462 U.S. at 336. The court of appeals in this case carefully weighed the competing interests of the federal government and the tribes, on one hand, and the state on the other. After conducting its particularized inquiry, it concluded that the federal/tribal interests outweighed that of the state and that, therefore, application of the state and local bingo laws would unlawfully interfere with tribal self government. For the reasons discussed above, that judgment was correct and should be affirmed by this Court.

IV. PUBLIC LAW 83-280 DOES NOT AUTHORIZE STATE JURISDICTION OVER TRIBAL BINGO GAMES

In addition to their "federal common law" argument, the appellants contend that PL-280 authorizes them to assert state jurisdiction over tribal bingo games. App. Br. 33-41. The court of appeals rejected this argument below, 783 F.2d at 901-903, as has every other federal court which has considered the question. See cases cited at n.1, above. For the reasons discussed below, the Court should affirm the results of these cases and reject the appellants' argument.

A. PL-280 Did Not Confer State Jurisdiction Over the Tribes Themselves

First, PL-280 did not confer upon the states any jurisdiction over the governmental activities of the tribes. This Court stated, in Bryan, that "there is notably absent any conferral of state jurisdiction over the tribes themselves," 426 U.S. at 389, and reiterated this view in Three Affiliated Tribes, 90 L.Ed.2d 881, quoting Bryan and emphasizing that "[w]e have never read PL-280 to constitute a waiver of tribal sovereign immunity, nor found PL-280 to represent an abandonment of the federal interest in guarding Indian self-governance." Id. at 894.

This view is fully consistent with the purpose of PL-280, which was to benefit Indian people by providing an increased degree of state-financed law and order services on reservations lacking adequate law enforcement resources, Bryan, 426 U.S. at 379-80, and to provide state judicial forums and their rules of decision for the resolution of private legal disputes where tribal forums were unavailable. Id. at 383. PL-280 was not intended to affect total termination of the tribes, or to undermine or destroy existing tribal governments. Id. at 388. Instead, the statute was intended to subject individual Indians to state judicial proceedings, as criminal defendants or voluntary civil litigants. The comparison in Bryan of the language of the Termination Acts (state law "shall apply

to the Tribe and its members") with that of PL-280 mandates the conclusion that Congress clearly knew how to subject tribal governments to state jurisdiction, but did not intend to do so in PL-280. Id. at 390.

This analysis of PL-280 is further supported by two important principles of federal law. The first is the "eminently sound and vital canon" that ambiguities in federal statutes passed for the benefit of Indians should be resolved in favor of the Indians. Id. at 392 (and cases cited there). While the Court cannot disregard clear congressional intent, it has also recognized that it is "not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected." Id. at 389, n.14. Where, as here, an "admittedly ambiguous" statute, id. at 392, can reasonably be interpreted in a manner which is consistent with "Congress' jealous regard for Indian self-governance," Three Affiliated Tribes, 90 L.Ed.2d at 893, it should be so construed.

In addition, where state law is made applicable to federal lands or activities on those lands by congressional enactment, those state laws must be construed and implemented in a manner consistent with overriding federal law and policy. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); King v. Gemini Food Services, Inc., 438 F.Supp. 964 (E.D. Va. 1976), aff'd. 562 F.2d 297 (4th Cir. 1977); Air Terminal Services, Inc. v. Rentzel, 81 F.Supp. 611 (E.D. Va. 1949); Sherick, State Jurisdiction Over Indians As a Matter of Federal Common Law: The Infringement-Preemption Test, 21 Arizona L. Rev. 85, 107-110 (1979). In construing PL-280 in Three Affiliated Tribes, the Court concluded that state "jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government." 90 L.Ed.2d at 891. In the case at bar, the attempted assertion of state jurisdiction is clearly inconsistent with self-government of the tribes, and is contrary to express federal policies promoting tribal bingo. Thus, a finding that PL-280 did not grant either civil or criminal jurisdiction over these tribal activities is required.

Finally, it is important to note that the tribal governmental immunity from state jurisdiction under PL-280 does not allow Indian tribes to operate Las Vegas-style casinos, or traffic in narcotics, or operate reservation-based brothels with impunity. Such activities would either be subject to federal prosecution under applicable federal law, e.g., 15 U.S.C. § 1175; 18 U.S.C. §§ 1955, 1961, or the individual participants would be subject to state prosecution under the criminal provisions of PL-280. We are not arguing here that Indian tribes, or individual tribal members, are free to engage in criminal conduct under the guise of tribal self-government. Rather, we contend that PL-280 does not authorize the State of California to prohibit tribal activities that are in furtherance of federal Indian policy and, in fact, sanctioned by the Secretary of the Interior, and treat them as "criminal" activities because they differ in minor ways from the manner in which the State authorizes the same conduct. Congress intended no such result when it enacted PL-280.

B. PL-280 Did Not Grant Regulatory Jurisidiction to Apply State and Local Bingo Laws on the Reservations

Assuming, arguendo, that the Court finds that PL-280 was intended to subject tribal activities to state jurisdiction, the appellants have advanced no credible justification for the application of state and local civil regulatory bingo laws to the tribally-sponsored games. Such laws cannot be enforced in Indian country under PL-280.

1. PL-280 Properly Distinguishes Between Civil/Regulatory and Criminal/ Prohibitory Laws

The appellants have challenged the decision below, as well as Barona, Seminole, Mashantucket Pequot and Oneida, all of which have drawn a distinction between state civil and criminal jurisdiction under PL-280. In each case, based on Bryan, the courts found that PL-280 did

not authorize the state to impose its general civil regulatory law in Indian country and that the state bingo laws in question were civil/regulatory rather than criminal/prohibitory. The appellants argue that this distinction is unwarranted and unworkable. App. Br. 34-38. The distinction, however, is required under the terms of PL-280, and is a workable, commonly applied standard under many federal and state statutory schemes.

First, it is apparent from the face of PL-280 that Congress expressly divided its grant of jurisdiction into separate civil and criminal components: see 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). Unlike the Termination Acts passed by the same Congress which broadly subjected some tribes and their members to all state laws, PL-280 was carefully crafted into two distinct parts. As a result, the court below, like this Court in Bryan, was entirely correct in distinguishing between state civil laws of a regulatory nature and state criminal laws which are prohibitory in intent.

The California Supreme Court has recognized and adopted precisely the same civil/regulatory criminal/prohibitory distinction under PL-280 as made by the court below. People ex rel. Department of Transportation v. Naegele Outdoor Advertising Company, 213 Cal. Rptr. 247 (1985), cert. denied ____ U.S. ____, 89 L.Ed.2d 570 (1986). In that case, the State's highest court determined that California could not regulate billboards located on Indian reservations by applying the California Outdoor Advertising Act.[27] In holding that PL-280 did not authorize the application of the state's billboard law on the reservation, the California Supreme Court cited Barona with approval, found that PL-280 gave the state

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[27]Like its bingo laws, the State's Outdoor Advertising Act authorized some billboards, Bus. & Prof. Code, § 5226; regulated them in certain ways, id. at § 5350, 5403, 5405; and included a criminal penalty for violations of the statutory scheme. Id. at § 5464.

jurisdiction only over private civil litigation, and concluded that the State could not apply its civil regulatory laws, like the Outdoor Advertising Act, on the reservation. 213 Cal. Rptr. at 253-54.

The distinction between civil/regulatory and criminal/prohibitory enactments is also routinely made in a wide variety of other federal and state contexts. For example, because the Assimilative Crimes Act, 18 U.S.C. §13, incorporates state criminal laws only, federal courts are commonly called upon to determine whether a particular state law is criminal/prohibitory or civil/regulatory in nature when reviewing prosecutions under the ACA. United States v. Rowe, 599 F.2d 1319, 1320 (4th Cir. 1979); United States v. Best, 573 F.2d 1095, 1098-1100 (9th Cir. 1978). In addition, under various state constitutions and statutes, state and local governments are frequently given the power to "regulate" a given activity, but not to "prohibit" it. State courts, therefore, have historically drawn this distinction in determining the propriety of state or local governmental action. See, e.g., City of Shreveport v. Belk, 258 So.2d 79, 80-81 (La. 1972); Blumenthal v. City of Cheyenne, 186 P.2d 556, 565-67 (Wyo. 1947).

Finally, various constitutional guarantees, such as those prohibiting compelled self-incrimination or double jeopardy, apply in criminal but not civil proceedings, requiring the courts to distinguish between the two in determining whether the protections apply. See United States v. Ward, 448 U.S. 242, 248-51 (1980); Helvering v. Mitchell, 303 U.S. 391, 399-405 (1938). Therefore, the appellants' claim that this distinction is arbitrary or unworkable is without merit. It is, in fact, required by the language and structure of PL-280, and represents a straightforward determination that federal and state courts routinely make in many contexts.

2. The Court Of Appeals Correctly Determined That California Bingo Laws Are Civil/Regulatory

In arguing that California's bingo laws are prohibi-

tory rather than regulatory, the appellants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

California state courts have done so under circumstances strikingly similar to those here. In In re Lawrence, 55 C.A.2d 491, 131 P.2d 27 (1942), the court was faced with reviewing a municipal ordinance which permitted pinball machines to be maintained in private homes and in certain specified "amusement zones" within the city, but proscribed their possession or use elsewhere within the municipality. The court clearly distinguished between "ordinances which prohibit entirely lawful businesses and occupations" and ordinances "which seek only to regulate such businesses." The court concluded that the pinball ordinance "is not prohibitory, but regulatory only." 131 P.2d at 31. Thus a statutory scheme very much like the state's bingo statute was held to be regulatory, and not prohibitory, in nature.[28]

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[28]Cases reaching the same conclusion involving other activities are legion. See, e.g., City of Shreveport v. Belk, 258 So. 2d 79, 81 (La. 1972); State v. Gregory, 70 P.2d 788, 791 (Wash. 1937); City of Butte v. Paltrovich, 75 P. 521, 522 (Mont. 1904).

Viewed in this light, the decision below that California's bingo laws are regulatory rather than prohibitory is certainly correct. The court below reached this conclusion on the basis of its earlier holding in Barona. In that case, the court carefully analyzed prior cases including United States v. Marceyes, 557 F.2d 1361 (9th Cir. 1977); Seminole; and Oneida. The Barona court correctly noted that there is no general prohibition against playing bingo in California; bingo games are sponsored by a broad range of groups and are widely played by the general population. 694 F.2d at 1189. The court also found that enforcement of state and local bingo laws against tribal games would be contrary to the present federal Indian policy of promoting tribal self-sufficiency. Id. at 1190. Finally, the court of appeals noted that the purposes to which tribal bingo proceeds went were "as worthy as the other charitable purposes to which bingo proceeds are lawfully authorized under the California statute." Id. On the basis of these findings, Barona held, and the court below affirmed, that bingo is not contrary to California public policy, that California bingo laws are regulatory rather than prohibitory, and that, therefore, under Bryan the state was not authorized under PL-280 to apply those laws on the reservations.[29]

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[29]The appellants suggest that the court of appeals improperly interjected a "public policy" test into its analysis of PL-280. The public policy test used there was adopted from the court's analysis of 18 U.S.C. § 1955 in United States v. Farris, 624 F.2d 890 (9th Cir.) cert. denied 419 U.S. 1111 (1980). In Farris, the court found that casino gambling was contrary to the public policy of Washington, and, therefore, was a violation of state law within the meaning of § 1955. Cf. U.S. v. Gordon, 464 F.2d 357 (9th Cir. 1972) (violation of non-penal state gambling regulations is not a violation of §1955). As applied in Barona and in this case, the public policy test is simply a shorthand statement as to whether a state's laws on a given subject are civil/regulatory or criminal/prohibitory

(footnote continued)

The appellants suggest that there are important distinctions between state authorized bingo, which they call "charitable," and tribal bingo, which they call "commercial." Yet, they do not explain the differences between the two.[30] Nor do they understand that tribal bingo is strictly regulated by the tribes under federal supervision, and is not "unregulated" gambling.

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[29](footnote continued)
within the meaning and intent of PL-280. Its use by the lower court is, therefore, consistent with the well-established principle that in interpreting statutes, the court must look not only to the particular words, but also to "the object and policy of the law." Stafford v. Briggs, 444 U.S. 527, 535 (1980).

[30]It is worth noting that the Commission on the Review of National Policy Toward Gambling, in whose findings the appellants place some reliance, stated:

> The Commission perceives little difference between "charitable bingo" and commercial bingo. Charitable bingo . . . is operated, however, like a commercial operation: it offers large cash prizes. . . and, most important, it is open to everyone, not just to members of the sponsoring organization. The Commission's survey has found that people play charitable bingo for the same reasons they might participate in commercial bingo: Bingo provides entertainment and a chance to make money. The charitable aspects of the game are relatively unimportant. For these reasons, the Commission recommends, for regulatory purposes, no distinction be made between charitable and commercial bingo.

J.A. 137-38 (emphasis added). The Commission Report, issued in 1976, was discussing bingo in general and did not discuss Indian bingo at all.

The appellants further argue that in state authorized bingo the stakes and profit potential are generally small, while tribal games "generate huge profits attractive to organized crime." App. Br. 25. There is absolutely no evidence in the record to support either of these allegations. While the prizes advertised and offered at the Cabazon and Morongo bingo establishments "sometimes exceed $250," J.A. 65, 83, the actual average jackpot per bingo game over a four-month period in early 1984 on the Cabazon Reservation was $184.89, well below the state limit of $250. At the same time, so-called "charitable" bingo operators were advertising $250 prizes on every bingo game played and cumulative cash giveaways of thousands of dollars. C.R. 84, Exhibits B through G, Supplemental Except of Record (SEOR) 50-55. Thus, the appellants' comparison of the stakes and profit potential of State authorized versus tribal bingo is based on pure speculation and nothing more.[31]

The appellants' additional contention that commercial gaming of any kind is contrary to California's public policy rings somewhat hollow in light of contemporary events. California horse bettors wagered more than $2 billion in 1982,[32] and more than 400 privately-owned poker clubs operate throughout the state where gamblers can bet unlimited amounts of money playing draw poker

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[31]Except for a $250 per game prize limit, the State does not regulate the amount of money that players can bet or that operators can make at State authorized bingo games. In 1979 the California legislature broadened the definition of bingo to include "pull-tab" devices that are now widely sold and offer potential $250 prizes on each card played. See People v. 8,000 Punchboard Card Devices, 142 Cal. App.3d 618 (1983). For a more complete analysis of "charitable bingo" and the vast sums of money involved therein, see Amicus Curiae Brief of the San Manuel Band of Mission Indians, filed in this case.

[32]California Horse Racing Board, Horse Racing in California: Statistical Report of Operations for 1982 at 1.

and panguingue and where the receipts and expenditures of the businesses are completely unregulated. Most recently, of course, the people of California approved a State Lottery that is awarding prizes worth millions of dollars, and on which Californians are betting a reported $8.6 million per day.

In United States v. Marceyes, 557 F.2d 1361, the court of appeals recognized that unless federal courts carefully distinguished civil/regulatory from criminal/prohibitory laws under the Assimilative Crimes Act, "a state could thereby enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations." This concern applies with even greater force with respect to the application of PL-280 on Indian reservations "because a state would thereby be able to implement all of its regulatory provisions" and "destroy the strong concept of tribal sovereignty carried on in such cases as [Bryan and Santa Rosa Band]." 557 F.2d at 1364.

The holding of the court below, like the earlier federal Indian bingo cases on which it relied, is fully consistent with this Court's analysis of PL-280 in Bryan and Three Affiliated Tribes and with current federal Indian policy promoting tribal bingo activities. On these bases, the Court should affirm the judgment below.

3. Appellants' Further Arguments Concerning PL-280 and Bryan Are Without Merit

Bryan v. Itasca County is an important cornerstone in the foundation of Indian tribal self-determination. It is not surprising, then, that the appellants seek to narrow its scope by arguing that it applies only to state taxation powers. Although the appellants contend that it was mere dicta, we believe that the Court meant what it repeatedly said in Bryan: that Congress, in enacting PL-280, did not intend to confer upon the states "general civil regulatory powers, including taxation." 426 U.S. at 390; 388 n.14; 387 and 384. In addition, the Court quoted

from and cited with approval Santa Rosa Band, a case not involving taxation, but the application of local building codes and zoning ordinances, giving further indication that a narrow reading of Bryan would be improper.

Appellants also argue that PL-280 permits the application of state regulatory laws on Indian reservations, unless specifically barred by federal law or regulation. App. Br. 36-37. This argument is merely an expanded version of the "negative implication" theory advanced by the State of Minnesota and flatly rejected in Bryan. 426 U.S. at 378-79.

The appellants also contend that a revisionist approach to PL-280 is warranted on the basis of previously unknown legislative history. App. Br. 37-38. This same argument has been made before, without success, United States v. County of Humboldt, 615 F.2d 1260, 1261-62 (9th Cir. 1980), and is simply incorrect. The 1953 Interior Department letter upon which appellants rely was clearly part of the record before the Supreme Court when it decided Bryan. J.A. 245-255. Thus, there is no newly discovered legislative history and no reasoned basis upon which to reconsider Bryan.

In light of the firm federal commitment to the goals of Indian self-determination and tribal economic self-sufficiency, it would be anomalous for the Court, in this case, to retreat from the position of support for effective tribal governments that it espoused in Bryan. Although that case involved taxation and this case involves bingo, the overriding concern is the same: protecting the economic security of fragile tribal governments from unwarranted state intervention. No persuasive argument has been advanced in this case that would justify any weakening of Bryan, and the Court should affirm the judgment of the court below.

V. STATE JURISDICTION IS NOT AUTHORIZED BY THE ORGANIZED CRIME CONTROL ACT

The appellants suggest that the Organized Crime Control Act (OCCA), 18 U.S.C. §1955, is relevant to this

case in two ways. They contend, first, that it demonstrates a federal policy favoring the application of state and local gambling laws on Indian reservations, a matter to be weighed in the Court's balancing of interests. App. Br. 41. In addition, they also appear to argue that it provides them with a statutory grant of authority to directly enforce state and local laws on the reservation - or at least to make arrests for purported violations. Id. at 42, n.26. In fact, neither of these contentions is correct.

First, current federal policies support tribal bingo, as discussed above at 22-26. There is nothing in the OCCA or its legislative history that states or suggests a federal policy to curtail the tribal activities at issue in this case. The legislative history does not mention Indian tribes at all. However, the OCCA expressly exempts:

> any bingo game... conducted by an organization exempt from tax under 26 U.S.C. §501(c)(3) if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

18 U.S.C. §1955(e). Significantly, this exemption applies whether or not a game conducted by a tax-exempt organization otherwise violates state or local law, and is therefore consistent with the limited objectives of the OCCA:

> It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial to be of national concern, and those corrupt state and local officials who make it possible for them to function.

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4029 (1970); see also United States v. Thaggard, 477 F.2d 626, 631 (5th Cir., 1973).

In Barona, the Ninth Circuit compared the purposes for which tribes conduct bingo games with those of the broad spectrum of private organizations which California law allows to conduct bingo games. The Barona court found the tribal purposes to be "at least as worthy as the other charitable purposes" for bingo proceeds under California law. "Although the Barona bingo operation does not fully comply with the letter of the statutory scheme, it does at least fall within the general tenor of its permissive intent." 694 F.2d at 1190. The uses to which the tribes in this case put their bingo proceeds are identical to those in Barona. Thus, just as the tribal bingo in Barona was found to be consistent with the tenor of California's bingo laws, so too is tribal bingo consistent with the federal policy toward non-profit bingo as expressed in the OCCA exemption.

Moreover, in assessing federal policy toward tribal bingo, the actions of the federal government are more persuasive than the arguments of the appellants. Despite the fact that various tribal bingo enterprises have been in operation since 1980, and that there are more than 80 such games now in operation around the country, the federal government has never attempted to enforce the OCCA against a tribal bingo enterprise. This fact alone belies any contrary interpretation of the OCCA by the appellants.

The appellants also raise a number of substantive arguments concerning the proper interpretation of §1955 and their authority to enforce it directly against the tribes. App. Br. 41-42. These arguments are not properly presented here, however, for the appellants lack standing to raise them and the issues are not ripe for review.

The OCCA is a federal criminal statute, the violation of which must be prosecuted by the United States in a federal criminal proceeding. United States v. Dakota, 796 F.2d 186 (6th Cir. 1986); see Johnson v. Yellow Cab, 321 U.S. 323 (1944); 18 U.S.C. §3231. The OCCA does not delegate enforcement authority to the states, and therefore, the states have no authority to enforce the

OCCA directly against the tribal activities at issue in this case. Dakota, 796 F.2d at 188-89; see Hancock v. Train, 426 U.S. 167 (1976); E.P.A. v. California Water Resources Control Board, 426 U.S. 200 (1976). As a result, the appellants simply have no standing to argue that the tribal enterprises at issue here violate the OCCA. Those questions must be raised and resolved in a federal criminal proceeding brought by the United States, such as Dakota or United States v. Farris, 624 F.2d 890.

The appellants also argue that even if they cannot enforce the OCCA, they can make arrests for its purported violation. However, this contention is not ripe for review here. Babbitt v. United Farm Workers, 442 U.S. 289 (1979). When the appellants actually made arrests in 1983, which precipitated the filing of this case, they were only for alleged violations of a local ordinance. J.A. 28. At no time in the district or circuit court proceedings did the appellants claim to have or threaten to exercise the power to enter these Indian reservations and make arrests under §1955; the first place in which that threat appears is footnote 26 of the Appellants' Brief to this Court. Thus, there is no basis in the record for a finding that there is an actual case or controversy as to that issue. Boyle v. Landry, 401 U.S. 77 (1971). Even if there had been a prior threat, it could not be deemed to be credible in view of the fact that the federal government has never prosecuted a tribal bingo enterprise for violation of the OCCA. See Ellis v. Dyson, 421 U.S. 426 (1975).

Finally, even if the Court should address the appellants' argument on the merits, it should affirm the ruling of the court below. In this case, as in Barona, the court of appeals relied upon its earlier decision in United States v. Farris, 624 F.2d 890. In Farris, the court had held that the OCCA applied to gambling activities that violated state law and were contrary to the state's public policy. Id. at 895-96. It thus made coextensive the tests for direct application of state law under PL-280 and application of federal law under §1955. As a result, the court below concluded that the tribal bingo games did not violate the OCCA. 783 F.2d at 903. For the reasons dis-

cussed above, at 38-42, that analysis and conclusion were correct, and should be affirmed by the Court.[33]

VI. RIVERSIDE COUNTY HAS NO JURISDICTION OVER THE CABAZON CARD ROOM

In addition to its tribal bingo parlor, the Cabazon Band also owns and operates a tribal card room on its Reservation, in which three specific card games are permitted. The legal status of these particular games under California law differs from that of bingo, thus warranting a separate discussion here.

Under California Penal Code § 330, gambling on 12 specified games and on any "banking and percentage game" is expressly prohibited. California courts have repeatedly held that gambling activities involving card games not expressly prohibited under that statute are permissible as a matter of State law. In Re Hubbard, 41 Cal. Rptr. 393, 399 (1964); Monterey Club v. Superior Court, 119 P.2d 347, 349 (1942). Although stud poker is expressly prohibited under § 330, draw poker, variants of draw poker including "low-ball," and panguingue ("pan"), are not prohibited under § 330, or any other statute and are, therefore, permitted under California law. See, e.g., People v. Philbin, 123 P.2d 159, 160 (1942) (draw poker and low-ball are not unlawful); People v. Ambrose, 265 P.2d 191, 194 (1953) (panguingue is not a "banking or percentage game"). As a result, a large commercial card room industry has developed and flourishes in

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[33] Although the 6th Circuit, in United States v. Dakota, viewed the Farris analysis of §1955 with disfavor, it did not support the position of the appellants here. Dakota held that the state has no authority to directly enforce the OCCA against tribal gaming activities. 796 F.2d at 188-89. Moreover, it did not question the interpretation of PL-280 advanced in Bryan, Barona, or this case, as applied to state jurisdiction over tribal bingo activities. Id.

California,[34] with more than 400 card rooms identical in every respect to the Cabazon card room. Where such games are played, the State does not regulate pot sizes or limit the amount of money that players can wager, win or lose, J.A. 83-84, and advertising of such games through print and electronic media is authorized. 66 Ops. Cal. Atty. Gen. 360 (1983).

Local governments may regulate these permissible gambling activities through licensing or taxation, Monterey Club v. Superior Court, 119 P.2d at 351, or may prohibit these activities altogether, In re Farrant, 181 Cal.App.2d 231 (1960), as Riverside County has done. However, the appellants concede that even if a county prohibits these games by ordinance, other units of local government within that county are free to enact their own local ordinances, permitting the games to be played, as two cities have done within Riverside County. J.A. 62-63.[35] The appellants have neither challenged these cities' authority to do so nor attempted to enforce the County ordinance against these games. Id.

Despite the fact that every other unit of local government within the State of California and Riverside County can decide for itself whether or not to permit these particular card games, the appellants argue that the Cabazon Band should be deprived of this element of self-government. In Bryan, the Court rejected this argument and recognized the devastating impact on tribal governments that would result from subjecting them to general state and local regulatory control which "might

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[34]The city of Gardena, California, for example, proudly bills itself as "The Poker Capital of the World." C.R. 59, Exhibit D, SEOR at 7.

[35]Since the 1984 factual stipulation entered in this case, the Cabazon Band has learned that the city of Blythe, as well as Lake Elsinore, permits commercial gambling on draw poker, low-ball and pan. There are four card rooms in Blythe.

relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them . . . ." 426 U.S. at 388-89, n.14. This is precisely the situation presented here.

This Court's citation to and reliance on Santa Rosa Band of Indians v. Kings County, 532 F.2d 635, in Bryan is also instructive on this point. In Santa Rosa Band, the court of appeals held that PL-280 did not subject reservation Indians to local jurisdiction. Instead, the court held that the tribal government on the reservation was "more or less the equivalent of a county or local government" empowered "to regulate matters of local concern within the area of its jurisdiction." 532 F.2d at 663. In this case, the Cabazon Band is seeking local decision-making authority within the parameters of State law to operate a card room for the purpose of generating tribal revenues. If the congressionally mandated goal of Indian self-determination has any substance whatsoever, it must include at least this minimal level of self-governance over the reservation.

The appellants have cited Rincon Band of Mission Indians v. San Diego County, 324 F.Supp. 371 (S.D. Cal. 1971) rev'd on other grounds 495 F.2d 1 (9th Cir.) cert. denied 419 U.S. 1008 (1974) for the proposition that a county anti-gaming ordinance was applicable to tribal card games on an Indian reservation. App. Br. 39, n.22. The appellants failed to note, however, that Santa Rosa Band expressly overruled Rincon, rejecting both its specific holding, 532 F.2d at 661 ("We cannot agree") and the reasoning upon which it was based. Id. at 662-64, and n. 14.

From the foregoing, it is readily apparent that the Cabazon Band is not "marketing an exemption" by permitting draw poker, low-ball and pan to be played on its Reservation, for these specific games are not prohibited under state law and are widely played throughout California and in five other card rooms in the Riverside County cities of Lake Elsinore and Blythe. Nor is there any significance to the fact that non-Indians may come

onto the reservation to play these games. Non-residents of Lake Elsinore and Blythe can readily go to these communities to play poker. Finally, there is no support whatsoever for the appellants' contention that the tribal card games are more prone to criminal infiltration than the hundreds of other identical games being played throughout the State. All of the factors discussed above, at 25-31, preventing criminal involvement in tribal bingo games, including the resources of the federal government, are equally applicable to the card games. For these reasons, the Court should affirm the right of the Cabazon Band to operate its tribal card room.

CONCLUSION

For all of the foregoing reasons, the Cabazon and Morongo Bands of Mission Indians respectfully urge this Court to dismiss this appeal for lack of jurisdiction or, alternatively, to affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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Only

Appendix A - 1

MORONGO BAND OF MISSION INDIANS
11581 Potrero Road
Banning, CA 92260

An Ordinance Regulating the Play of the Game of Bingo on the Morongo Indian Reservation

BE IT ENACTED BY THE MORONGO BAND OF MISSION INDIANS AS FOLLOWS:

Section 1 - Definitions

The following terms and phrases when used in this Ordinance, shall have the following meanings ascribed to them, Except where the context clearly indicates a different meaning:

(a) Bingo or quest game shall mean and refer to the activity commonly known as bingo and all other similarly organized and played games wherein participants pay a sum of money for the use or benefit of one or more prenumbered cards. When the game commences, numbers are drawn by chance, one by one, and announced, and numbers are continually ascertained at random, until a participant announces that he has matched up on his prenumbered purchased card enough randomly drawn numbers to complete the desired winning pattern of numbers. At this time the participant calls out "bingo" or such other desired word or phrase and is declared the winner of a predetermined prize.

(b) Bingo cards shall mean and refer to the flat, usually rectangular piece of paper or thin pasteboard normally employed by players engaged in the game of bingo. More than one set of bingo numbers may be printed on any single piece of paper.

(c) Band or Morongo Band of Mission Indians shall mean the semi-sovereign federally-recognized Indian tribe which, along with certain of its members, is the beneficial owner of and the local government for the allotted and unallotted trust lands of the Morongo Indian

Reservation, located to the east of the City of Banning, County of Riverside, State of California. The Band acts through its duly-serving Tribal Council or Business Committee according to the custom and tradition of our people.

(d) Reservation or Morongo Indian Reservation shall mean all those parcels of land, both allotted and unallotted and whether or not held in trust by the United States for the Band itself or any individual Indian, which are described and included in the patent issued on December 14, 1908 by the United States to the Band for the said lands, plus any additional such lands later added to the Reservation by the United States.

(e) Player shall mean any person paying some amount of U.S. currency for admission to, or participation in, a bingo game and who has some reasonable expectation of receiving a prize if one or more of his prenumbered cards contains a sufficient amount of numbers which are the same as those announced during a bingo game.

(f) Prizes shall mean and refer to any U.S. currency, cash or other property or thing of value awarded to a player of a bingo game or players in one or a series of bingo games.

Section 2 - Findings

The Morongo Band of Mission Indians makes the following findings and bases this Ordinance thereon:

(a) The Morongo Band of Mission Indians is a semi-sovereign federally-recognized Indian tribe with the duty and authority to regulate the activities of its members and others on the Reservation in the interest of the Band and its members to the maximum extent permitted by federal law.

(b) There is a great unmet need for economic development to stimulate the Reservation's economy, and

a bingo operation will help to meet that need by providing employment for Band members, by attracting other business ventures, by encouraging Band members to make commercial use of their allotted trust lands, and by providing funds for the Band to use for general Band purposes.

(c) Due to present economic conditions, unemployment among Band members, which has always been above 50%, has reached an unacceptable level, causing severe economic hardship to many members of the Band, and must be addressed by the Band now, partially through this Ordinance.

(d) The Band now lacks the financial resources to provide adequate services for the health, welfare, and general benefit of its people, and will use the revenue from the bingo enterprise license granted under this Ordinance as a source of such funds, as noted below.

(e) According to its custom and tradition, the Band generally does not regulate the uses to which any member of the Band may devote his own allotted trust land. However, the Band anticipates that more than one member, and possible the Band itself, may wish to operate bingo enterprises on the Reservation, and that such a proliferation of bingo enterprises on the Reservation is not in the best interests of the Band. For this reason, the number of such bingo enterprises, and certain aspects of their operation, must be regulated for the health, welfare, and general interest of the Band and its members.

(f) By this Ordinance the Band intends to pre-empt and to fully occupy the field of the regulation of bingo on the Reservation, as to all those who conduct such bingo games and all those who play such bingo games, Indian and non-Indian alike.

Section 3 - Morongo Tribal Bingo Enterprise

(a) A Morongo Tribal Bingo Enterprise is hereby authorized and established as part of and for the benefit of the Morongo Band of Mission Indians.

(b) The Morongo Tribal Council is authorized and empowered to obtain suitable facilities, including parking facilities, within the exterior boundaries of the Morongo Indian Reservation, to operate and maintain the Morongo Tribal Bingo Enterprise for this purpose to enter into binding leasehold agreements or other appropriate arrangements for buildings and property located within the boundaries of the Reservation.

(c) In order to obtain persons with the necessary business and management knowledge and experience to operate the Morongo Tribal Bingo Enterprise, the Morongo Tribal Council is authorized to enter into management agreement for the maintenance, operation and management of the Tribal Bingo Enterprise on such terms and under such conditions as the Tribal Council shall determine to be fair and reasonable and in the best interests of the Morongo Band of Mission Indians; provided that the Tribal Council shall not agree to pay any management fee which is not in its judgment necessary under prevailing market conditions to obtain competent and skilled management and business assistance for the operation of the Morongo Tribal Bingo Enterprise.

(d) Bingo games may be conducted each and every day of the week and at any hour of the day or night. Games shall be operated by the Morongo Tribal Bingo Enterprise not less than three days (Friday, Saturday and Sunday) per week. There shall be no limit as to prize money for any single game or session.

(e) No person under eighteen (18) years of age shall be allowed to play bingo.

(f) All persons operating or assisting the operation or conduct of any bingo game shall wear tags evidencing their names, or other means of identifying such persons as employees of the bingo operator.

Section 4 - Use of Net Proceeds

The Band will use all of the revenues which it collects pursuant to this Ordinance for the support of programs to promote the health, education and general welfare of its people.

Section 5 - Prohibition and Penalties

(a) No person shall conduct, operate, maintain or participate in any bingo game within the boundaries of the Morongo Indian Reservation unless such bingo game is operated or conducted by the Morongo Tribal Bingo Enterprise in accordance with this Ordinance. The Tribal Council may waive this section in the case of bona fide charitable churches or other similar nonprofit reservation-based organizations who apply for exemption, provided however that such organizations do not offer prizes in excess of those allowed by California Penal Code § 326.5.

(b) Any person determined by the Band, acting through its Tribal Council, to be in violation of this Ordinance may be fined up to $500.00 for each violation.

Appendix A - 6

CERTIFICATION

We the undersigned, the duly elected officers of the Morongo Band of Mission Indians do hereby certify that the above Ordinance was adopted by the General Council at a duly authorized election held on April 23, 1983, by a vote of 150 "for", 149 "opposed".

[Robert Martin]
Robert Martin, Chairman

[Rodney Mathews]
Business Committee Member

[Paul Martin]
Business Committee Member

[Dennis R. Miller]
Business Committee Member

[Anita Soza]
Business Committee Member

[George Daily]
Business Committee Member

[Joanna Ruiz]
Business Committee Member

Approved: Secretary of the Interior

APPROVED: [9-16-86]

[Maurice Babby]
AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS, SACRAMENTO AREA OFFICE

Pursuant to the authority delegated by 209 DM 8 and 10 BIAM 3.1.

Appendix B - 1

CABAZON BAND OF MISSION INDIANS
84-245 Indio Springs Drive
Indio, CA 92201

WHEREAS: We are approving said Bingo Ordinance

TRIBAL ORDINANCE NO. 5.6:
REGULATION OF BINGO GAMES

Section 1:

As used in this ordinance, "bingo" means (a) a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random; or (b) the use of cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes; the winning cards shall not be known prior to the game by any person participating in the playing or the operation of the game; and all such preprinted cards shall bear the legend "Cabazon Indian Reservation."

Section 2:

In order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues, by the Cabazon Band of Mission Indians. Bingo games are hereby authorized on and within the boundaries of the Cabazon Indian Reservation, provided that such games are in conformity with laws of the Cabazon Band of Mission Indians and this ordinance.

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Section 3:

All bingo games authorized by this ordinance shall be sponsored by the Cabazon Indian Reservation. No other person, group, corporation, individual, Indian Tribe or Band, or entity is or shall be authorized to sponsor a bingo game on or within the boundaries of the Cabazon Indian Reservation.

Section 4:

All net revenues derived from a bingo game shall be kept in a special fund or account and shall not be comingled with any other fund or account. Such net revenues shall be used for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes.

Section 5:

Bingo games shall be open to the public.

Section 6:

No person under eighteen years of age shall be allowed to participate in any bingo game.

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Appendix B - 3

CERTIFICATION

We, the undersigned duly elected members of the Cabazon Band of Mission Indians, acting as and for the Cabazon Business Committee and General Council, pursuant to powers delegated to us by General Council Resolutions dated April 10, 1983 and June 5, 1985 do hereby certify the foregoing Ordinance is a true and correct copy of Cabazon Tribal Ordinance No. 5.6, as originally adopted on February 9, 1980, and as amended through September 11, 1986. Done by the Cabazon Business Committee at a special meeting conducted on SEPTEMBER 11TH, 1986 by a vote of 4 for, 0 against, 0 abstaining, at which meeting a quorum of 4 members were present.

[Arthur Welmas]
Arthur Welmas,
Tribal Chairman

[John A. James]
John James,
Secretary-Treasurer

[Brenda James Montez]
Brenda James Montez,
1st Vice Chairman

Charles Welmas,
2nd Vice Chairman

[Elisa Welmas]
Elisa Welmas, Liason
to the General Council

Approved: Secretary of the Interior

APPROVED: [9-16-86]

[Maurice Babby]
AREA DIRECTOR, BUREAU OF
INDIAN AFFAIRS, SACRAMENTO
AREA OFFICE

Pursuant to the authority
delegated by 209 DM 8 and
10 BIAM 3.1.

Appendix C - 1

CABAZON BINGO, INC.
84-245 Indio Springs Drive
Indio, CA 92201

August 28, 1986

Mr. Ron Sainz
Bingo Pavilion, Inc.
c/o Indian Palms Country Club
48-630 Monroe Street
Indio, CA 92201

Dear Mr. Sainz:

Several months ago, we forwarded to Mr. Reader new federal guidelines issued by the Assistant Secretary of the Interior on April 7, 1986. These federal guidelines require that all bingo management contracts must be approved by the Secretary of the Interior to be valid.

The Secretary's requirement that all bingo contracts be approved is required under the terms of three recent federal Court of Appeals decisions. United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984); Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985); A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986). The last two of these cases deal specifically with bingo management agreements and hold that such contracts, if not approved by the Secretary, are null and void.

The Secretarial guidelines of April 7, 1986 spell out in detail the minimum requirements for an approvable bingo management agreement. In comparing the agreement between the Cabazon Band and Bingo Pavilion, Inc., with the Secretarial requirements, we find that there are substantial differences between our agreement and the terms that would be acceptable to the Secretary.

Mr. Ron Sainz
Bingo Pavilion, Inc.

Given these substantial differences in acceptable contract terms, and the fact that the Cabazon Bingo Palace has not proven to be as successful as either side initially hoped, the Cabazon Business Committee sees no benefit in attempting to renegotiate the bingo management agreement to bring it into compliance with the new federal requirements. Instead, the Cabazon Band intends to repay all of the initial capital advanced by Bingo Pavilion, Inc., with interest, and to treat the management agreement as having been terminated by operation of law.

It is our position, therefore, that the purported agreement between Bingo Pavilion, Inc. and Cabazon Bingo, Inc. is now null and void, and that all rights and obligations of either party under that agreement have been terminated. In the interest of fairness, however, Cabazon Bingo, Inc. will repay the balance due on all initial capital advanced by Bingo Pavilion, Inc., with interest.

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Mr. Ron Sainz
Bingo Pavilion, Inc.

We believe that this action, which is mandated by current federal law, is an equitable means of resolving this problem.

Sincerely,

[Arthur Welmas]

Arthur Welmas
Cabazon Bingo, Inc.

AW/mlm

[Arthur Welmas]
Arthur Welmas,
President

[John A. James]
John James,
Secretary

[Brenda James Montez]
Brenda James Montez,
Treasurer

[C.D.W.]
Charles Welmas,
Vice President

Appendix D - 1

BUREAU OF INDIAN AFFAIRS

DIVISION OF LAW ENFORCEMENT SERVICES

This presents that

Bruce Alexander James

is by authority vested in me by law commissioned a Deputy Special Officer in the Bureau of Indian Affairs and authorized to conduct investigations and exercise authority delegated by virtue of 18 U.S.C. 3055.

/s/

AREA DIRECTOR

Appendix D - 2

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHERN CALIFORNIA AGENCY
3600 LIME STREET, SUITE 722
RIVERSIDE, CALIFORNIA 92501

June 20, 1986

Cabazon Band of Mission Indians
Attn: Mr. John Nichols
84-245 Indio Springs Dr.
Indio, CA 92201

Dear Mr. Nichols:

The enclosed position description is mailed in reference to the IPA assignment we had discussed last week in our office.

Sincerely,

[Tom Dowell]
Superintendent

Enclosure

As a Federal police officer, this position will patrol all reservations under the auspicies of the Southern California Agency which consists of 32 various reservations for violations of Federal Fish & Games, timber resource violations, destruction of government property, theft/ embezzlement from tribal organizations, security for BIA enclaves (BIA storage areas and administrative offices), to prevent or eradicate the illegal cultivation of marijuana on managed lands, and any other violations of other general laws of the United States (excluding 18 USC 1151 and 1153 because of P.L. 280) that occur within the Exterior Boundaries of the reservations (i.e. felon in possession of a firearm, arson, narcotic violations, assaulting Federal officers or employees, etc)

DUTIES:

Maintains law and order within the area of assignment by patrolling in a patrol vehicle, investigating suspicious situations, and taking action as appropriate.

Where serious crimes or personal injury traffic accidents are involved, determines necessary action, notifies appropriate authorities, safeguards scenes, identifies and obtains information from witnesses, and develops preliminary investigative leads where the Bureau of Indian Affairs may be held civilly liable. Performs investigative work such as investigation of misdemeanors, traffic accidents involving property damage or personal injury, or incidents of alleged or suspected burglary or vandalism. Investigates, apprehends, arrests, and detains persons charged with violations of Title 25, Code of Federal Regulations; Title 19 United States Code; Tribal Law and Order Codes; Federal, state and tribal games and fish laws; and all other Federal or state statutes that may be applicable.

Makes arrests in cases of crimes of misdemeanors personally witnessed or upon establishment of necessary probable cause, takes persons arrested before appropriate authority for booking or formal charging; serves Federal, state, local or tribal warrants, subpoenas and other court

papers; testifies at hearing and trials as an expert witness in Federal, state, local and tribal courts as required; and prepares and submits reports of incidents or traffic accidents, daily and weekly activities, and narrative and statistical reports as required.

FACTORS

1. Knowledge Required by the Position:
Incumbent must have a knowledge of law enforcement procedures and techniques; ability to work and deal effectively with individuals and groups, skill in collection, assembling and presenting pertinent facts; ability to prepare clear and concise reports; and ability and willingness to accept responsibility.

A working knowledge of most applicable Federal, state, local and tribal laws and tribal customs; fish and game laws appropriate to the location; jurisdictional laws, rules and relationships in the area served and differences with respect to neighboring states and tribes; and laws applicable to specific areas, incidents and individuals.

Thorough knowledge of the Constitutional protections afforded to individuals including rules concerning search, seizure, questioning and arrest; the difference between felonies and misdemeanors and between criminal and civil infractions; and the procedures for handling suspects.

Thorough knowledge of, and competence in the use of, all firearms used in performing the work of the position.

Thorough knowledge of first aid, including CPR, and of the equipment used in first aid.

Knowledge of radio procedures and ability to operate radio equipment.

Must be a capable and competent driver with a good driving record, and must possess a valid driver's license.

Must be able to learn to operate patrol boats and trucks.

2. Supervisory Controls:
The incumbent works under the supervision of the Supervisory Police Officer (Sgt) who provides guidance in overall policies and desired results. The incumbent is expected to perform assigned functions on own initiative utilizing experience, skill and tact. Work is reviewed frequently out of contact, the incumbent must act on all types of problems on own initiative based on knowledge of enforcement procedures and policies.

3. Guidelines:
Guidelines include the full array of Federal, state, local and tribal laws concerning crimes and misdemeanors; Title 25, Code of Federal Regulations; Title 18 United States Code, Bureau of Indian Affairs Manual; Area and Agency policies and directives; Constitutional rules and precedent court decisions concerning the rights of suspects; rules of evidence; and police instructions and operating procedures, also the IPA agreement provisions must be upheld. The guidelines are extremely complex and frequently may be incomplete or inappropriate to the situation, and the incumbent is expected to make some independent judgments concerning the seriousness of an incident or the proper approach without recourse to supervision.

4. Complexity:
The incumbent is involved in all types of police activity, including dealing with civil and criminal infractions under Federal, state, local and tribal laws which may be at variance or in conflict with one another. The proper course of action may have to be selected from many alternatives. The full range of possible human actions is involved and the web of applicable laws and jurisdictional rules is extremely complex.

Identifies violations and as required makes arrests or issues citations; confiscates evidence and may transport violators by foot, automobile, or boat. Handling procedures differ according to severity of violation committed, geographical location, and available assistance.

5. Scope and Effect:
The work has considerable impact on the safety and well-being of the community served; on relations between the Bureau and the tribe and between the tribe and surrounding non-Indian communities; and on relations with Federal, state, local and Tribal law enforcement units.

Actions can mean a difference between life and death and between order and disorder. The purpose of the work is to prevent crime through an alert, visible law enforcement presence; to stop illegal acts as they occur; and to preserve peace, safety and order within the community served through effective police action.

The enforcement of applicable regulations and laws will assure the interests of the United States Government and Tribes by protecting not only the timber resources and other natural resources, but also by securing the safety and well-being of Bureau employees assigned to the Southern California Agency along with the thousands of dollars of Bureau-owned equipment.

6. Personal Contacts:
Personal contacts are with the general public, both Indian and non-Indian, as citizens and with individuals or groups as suspected or observed offenders, as witnesses, complainants, victims, prisoners, or persons on parole; with tribal officials, with state, local and tribal police officers and other BIA police officers; and with court and law enforcement personnel at the Federal, state and local Tribal levels.

7. Purpose of Contacts:
Contacts with the public are to secure compliance with laws and regulations and to prevent infractions. Contacts with suspects and offenders are to prevent or stop illegal activity and to question, detain and, if necessary, arrest them. Contacts may involve breaking up fights, disarming angry or distraught persons, calming potentially violent situations, and/or apprehending and arresting resisting violators. Contacts with court officials are to con-

duct offenders and suspects to and from court sessions or to provide expert testimony.

Contacts with other law enforcement officials involve securing cooperation or assistance or working out issues of jurisdiction. Contacts with tribal officials involve explaining enforcement actions, explaining laws and regulations, working out procedural or jurisdictional problems, obtaining warrants, and similar activities.

8. Physical Demands:
Incumbent must have considerable physical strength and agility to pursue suspects, sometimes on foot; to make and maintain arrests despite possible resistance; to move heavy objects which may present hazards (objects on the highway, etc); to fight fires; to make searches involving traversing difficult terrain under adverse conditions; and to handle any emergency situation. Incumbent must be able to defend self and others against physical attack.

9. Work Environment:
The work environment involves high risk with exposure to potentially dangerous situations, including attack with deadly weapons at unexpected times. Both indoor and outdoor work is involved, including driving or working outside in extreme weather. There is an ever-present danger of death or injury from physical assault or accident in the line of duty.

The incumbent will be subjected to a wide range of risks and discomforts in making arrests, patrolling areas on foot and by automobile.

No. 85-1708

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

VS.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' CLOSING BRIEF

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On Appeal from the United States Court of Appeals for the Ninth Circuit

---

APPELLANTS' CLOSING BRIEF

ARGUMENT

I.

THE COMMON LAW BALANCING TEST SUPPORTS STATE AND LOCAL JURISDICTION IN THIS CASE.

A. Applicability of Balancing Test.

In our opening brief, we observed that this Court has adopted a common law balancing test in determining state jurisdiction over Indian reservations. See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980) (question requires a "particularized inquiry" into the "nature of state, federal, and tribal interests at stake"); State Br. 10-11. The appellees and amici tribes argue that the balancing test does not apply where the state asserts jurisdiction over Indians rather than non-Indians, and that the state lacks jurisdiction in such cases unless Congress expressly provides otherwise. Brief of Appellees ("Tribes Br.") 16-17; Laguna A.C. Br. 7-14; Tulalip A.C. Br. 23-29. In *Rice v. Rehner,* 463 U.S. 713 (1983), however, this Court applied the balancing test in holding that California can regulate liquor sales by licensed Indian traders to non-Indian buyers. Similarly, in *Washington v. Confederated Tribes of the Colville Reservation (Colville),* 447 U.S. 134 (1980), this Court applied the balancing test in holding that Washington State can tax on-reservation cigarette sales by tribal smokeshops to non-Indian buyers. The Court in both cases made clear that the balancing test has particular relevance where the tribal enterprise depends on non-Indian patronage, stating that principles of tribal sovereignty are not implicated in such cases. *Rice,* 436 U.S. at 721, & n. 7, quoting from *Colville,* 447 U.S. at 151, & n. 27.

Here, the tribal games solicit and depend on non-Indian patronage. Indeed, the games are successful because they are operated free of constraints applicable to non-Indian enterprises. Further, the games are operated by non-Indian professional operators who have entered into management contracts with the Tribes. JA 63-65, 81-83. In effect, non-Indian operators are conducting bingo games played by non-Indian patrons in circumvention of State law. In light of the extensive non-Indian involvement here, the balancing test is particularly appropriate in determining the jurisdictional issue.

The Tribes argue that *Rice* is distinguishable because the Court merely interpreted and applied a federal statute, 18 U.S.C. § 1161, not applicable here. Tribes Br. 11; Jicarilla A.C. Br. 7; Chehalis A.C. Br. 20; Laguna A.C. Br. 12-13. This argument ignores both the analysis and result in *Rice*. The Court in *Rice* held that the jurisdictional question depends primarily on whether federal law preempts state law. *Rice*, 463 U.S. at 718-720. According to the Court, the preemption analysis depends on the nature of the tribal "tradition;" in the absence of a sovereign tribal "tradition," the Court will attach "less weight" to tribal sovereignty in determining the preemption issue. *Id.* Employing this analysis, the Court reasoned, in Part A of its decision, that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *id.* at 722, and in Part B that the federal statute, 18 U.S.C. § 1161, does not preempt—and indeed authorizes—the application of state regulatory liquor laws on Indian reservations. *Id.* at 725-735. In short, the Court, having determined that a sovereign tribal "tradition" did not exist, held that federal law does not preempt state law and indeed has the opposite effect. Since Indian tribes do not have a sovereign tradition of conducting high stakes gambling operations catering to non-Indians,[1] and since no federal statute

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[1] The Tribes argue that the tribal gambling operations are an "adaptation" of traditional Indian gambling practices, citing the declaration of an expert anthropologist. Tribes Br. 13-14. Whether or not the operations are an "adaptation"—an argument rejected by the district court, see State Br. 19 n. 10—it is clear that Indian tribes have not traditionally conducted high stakes gambling operations catering primarily to non-Indian patrons, as here. State Br. 18-19 n. 10. Indeed, the Tribes' anthropologist acknowledged that Indians traditionally gambled only for religious and ceremonial purposes, *id.*, which is consistent with the declaration of another expert anthropologist stating that Indian tribes have not traditionally engaged in the type of activity involved here. *Id.*

As we explain later, the legislative history of the Organized Crime Control Act, 18 U.S.C. § 1955, indicates that gambling regulation falls within the traditional province of state and local agencies. 116 Cong. Rec. 35294 (1950) (remarks of Sen. Allott) ("[L]ocal law enforcement officials . . . bear the primary responsibility in this area"). The situation here is similar to *Rice*, where this Court noted that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of *liquor regulation* by Indians." *Rice*, 463 U.S. at 722 (emphasis added).

preempts the application of State and local gambling laws, the *Rice* analysis directly supports the application of State and local laws here.

The Tribes argue that *Colville* is distinguishable because the legal incidence of Washington State's sales tax fell on non-Indian buyers,[2] and the legal incidence of California law here falls on the Tribes. Tribes Br. 9-10. The Tribes' argument is misplaced for two reasons. First, the Court in *Colville* attached primary significance to the tribes' attempt to gain a competitive advantage over non-Indian businesses by "market[ing] and exemption" from State laws to non-Indians. *Colville*, 447 U.S. at 155. Rejecting the tribal argument that the Indian Commerce Clause preempted State law, the Court noted that although its decision will "lessen or eliminate tribal commerce with non-members, that market existed in the first place only because of a claimed exemption from these very [State] taxes." *Id.* at 157. Thus, the Court held that Indian tribes cannot gain a competitive advantage against non-Indian businesses by marketing exemptions from state law, regardless of where the incidence of state regulation falls. Second, the immediate incidence of California's gambling laws here falls directly on non-Indian professional operators who conduct the gambling operations, JA 63-64, 81-83, and thus falls on non-Indians in any event.

The Tribes also argue that *Colville* is distinguishable because the Tribes here, unlike those in *Colville*, provide "value" to non-Indians who play the games. Tribes Br. 10. The tribal product has "value," however, only because the Tribes are offering a product—high stakes bingo—that is unlawful in California and thus that non-Indian enterprises cannot similarly offer. In other words, the tribal product has "value" only in the sense that contraband has "value," because it is marketed to buyers who cannot lawfully obtain it under state law. The value of the tribal product depends

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[2] The Tribes assert that *Colville* held that "Washington's separate tobacco products tax could not be imposed, because the legal incidence of that tax fell directly on the tribal sellers." Tribes Br. 9. *Colville* specifically noted that "[t]he State did not appeal" the lower decision holding that the State tobacco products tax cannot be applied, and for that reason that "all parties agree" that the tax cannot be imposed. 447 U.S. at 139 n. 2. Thus, the tobacco products tax issue was not before the Court.

less on tribal efforts than on state laws prohibiting the product. Such "value" is not entitled to judicial cognizance.

B. Common Law Displacement.

The Tribes argue that the common law balancing test, if otherwise applicable, has been displaced or "preempted" by Public Law 280, citing this Court's decisions in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering (Three Tribes)*, ____ U.S. ____, 90 L.Ed.2d 881, 890 (1986), and *Kennerly v. District Court*, 400 U.S. 423 (1971). Tribes Br. 17-19. In *Three Tribes*, this Court held that North Dakota could not retrocede jurisdiction over Indian reservations acquired under Public Law 280 by requiring tribes to waive sovereign immunity as a condition for access to state courts. The Court ruled that "Congress specifically considered the issue of retrocession but did not provide for disclaimers" of jurisdiction acquired under Public Law 280, and that North Dakota's attempted retrocession conflicted with the "congressional plan embodied in Pub L 280 and thus [is] . . . preempted by it." 90 L.Ed.2d at 892. In effect, the Court held that Public Law 280 specifically regulates retrocession and thus preempts all inconsistent state laws. Similarly, in *Kennerly*, the Court held that Montana had not acquired jurisdiction under Public Law 280 pursuant to specific procedures contained in the act, and therefore that Montana could not assert jurisdiction thereunder.

Public Law 280, however, does not similarly evince a congressional intent to displace state regulatory jurisdiction over Indian reservations, where such jurisdiction exists under other federal laws or under the common law balancing test. If the result were otherwise, Public Law 280 states would have less jurisdiction over Indian reservations than non-Public Law 280 states, where the latter states have jurisdiction under other federal laws or under the balancing test. This result would conflict with the purpose of Public Law 280 to broaden rather than reduce state jurisdiction over Indian reservations.[3] Thus, although Public Law 280 exclu-

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[3] The Senate report accompanying H.R. 1063, which became Public Law 280, repeated in substance the House report, and stated that:

> "This legislation . . . has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws

sively defines a state's authority to acquire or retrocede jurisdiction thereunder, as held in *Kennerly* and *Three Tribes*, Public Law 280 does not exclusively define a state's authority to regulate gambling on Indian reservations. Although, as we argue later, we believe that Public Law 280 delegates such authority, it does not displace such authority as may otherwise exist.

Indeed, the Tribes' preemption argument is inconsistent with *Rice* itself. In *Rice*, this Court held that California—a Public Law 280 state—has the right to regulate liquor sales on Indian reservations. If Public Law 280 preempts state regulatory jurisdiction, California would lack authority to regulate such liquor sales except where such authority is delegated under Public Law 280 itself, a question not considered in *Rice*. Under this analysis, *Rice* would have been wrongly decided.

C. Federal Preemption.

Apart from whether Public Law 280 displaces the federal common law, the Tribes argue that other federal laws preempt State and local laws as applied here. First, they argue that "current federal Indian policies" favoring tribal economic development preempt State and local laws. Tribes Br. 22-24. These federal policies, they argue, are reflected in a presidential policy statement encouraging tribal development, an internal memorandum from the Acting Assistant Secretary of Indian Affairs relating to an unidentified legislative proposal, and a declaration submitted in this action by an official of the Bureau of Indian Affairs (BIA). *Id.* The presidential policy statement, however, does not mention gambling or bingo as a means to achieve tribal economic development. The statements by the BIA officials are insufficient to establish an authoritive, cohesive federal policy concerning the issues here. Indeed, the BIA statements are inconsistent with the testimony of a Department of Justice representative during a 1984 congressional hearing, stating among other things that Indian tribes lack the "authority or resources to police these types of activities." State Br. 26 n. 16. Unlike *Rice*, the federal government has not filed an amicus brief supporting the tribal position here. In any event, the statements cited by the Tribes lack the force of law and cannot have a preemptive effect.

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applicable to Indians as such." S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83rd Cong., 1st Sess. 3 (1953).

Second, the Tribes argue that the Secretary of the Interior maintains oversight authority by approving tribal bingo ordinances, and that the exercise of this authority preempts State and local laws. Tribes Br. 25-26. In *Rice* and *Colville*, however, the Secretary had also approved the tribal ordinances in question, *Rice*, 463 U.S. at 716; *Colville*, 447 U.S. at 144, and, since the Secretary did not otherwise regulate the matter, the Court attached little significance to such approval. Indeed, the Court in *Rice* specifically rejected the argument that secretarial approval signified a congressional intent to "occupy the field," stating that the argument was contrary to "the plain language of the statute and its legislative history." *Rice*, 463 U.S. at 734 n. 18.

More importantly, the Secretary's approval of tribal bingo ordinances is not a prerequisite for tribal operation of the games, and many games are operated without such approval. The Cabazon Tribe here, for example, although commencing its bingo operation in or around March 1983, JA 27, did not seek or obtain secretarial approval until September 16, 1986, barely a week before the Tribe filed its brief on the merits. Tribes Br. App. B-3. This scenario suggests that the Tribe was attempting to improve its position in this litigation rather than comply with a prerequisite, and in any event shows that the Secretary maintains little or no regulatory control over the games.

The Secretary's lack of regulatory control is reflected in his failure to adopt regulations governing the operation of the tribal games. He does not, for example, regulate operating personnel, the size of jackpots, the days or hours of operation, or the distribution of revenues.[4] The games are wholly unregulated, and

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[4] The Tribes note that the Secretary, under 25 U.S.C. § 81, has issued guidelines establishing conditions for his approval of tribal bingo management contracts, and that the guidelines require an FBI investigation of non-Indian management personnel. Tribes Br. 25-26, 30; San Manuel A.C. Br. 12-13. In fact, Indian tribes are free to conduct bingo games without obtaining secretarial approval of management contracts, and often do not secure such approval. The provision cited by the Tribes, 25 U.S.C. § 81, assuming that it applies to bingo operations at all, provides only that contracts involving tribal funds or lands are "null and void" without secretarial approval; that any money "paid to any person by an Indian or tribe" pursuant to an unapproved contract can be recovered in an action brought "in the name of the United States;" and that the recovered moneys shall be equally divided between the plaintiff and the

each tribe controls its own games. The tribes can hire any operating personnel, offer jackpots in any amount, commingle bingo revenues with other revenues, and use revenues for any purpose. For example, tribal revenues can be used to enrich individual tribal members rather than fund tribal programs. The Secretary's role is vastly different than in other cases where secretarial involvement has been held to preempt state laws. See *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). This case, unlike those, presents a regulatory void.

In our view, federal policy here is most clearly expressed in the Organized Crime Control Act (OCCA), 18 U.S.C. § 1955, which prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." The

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tribe. Thus, secretarial failure to approve a management contract merely makes the contract unenforceable but does not render the games illegal. Moreover, the risk of nonenforceability falls on the non-Indian operator, not the tribe; 25 U.S.C. § 81 provides only for recovery of moneys paid "by" an Indian or tribe, not for recovery of moneys paid *to* an Indian or tribe. The manifest purpose of the provision is to protect Indian tribes from unapproved contracts, not to protect those with whom they contract. For this reason, the provision has been invoked only in cases where non-Indians sought relief against Indian tribes for breach of unapproved contracts, and the provision was invoked to deny such relief. See *A. K. Management Co. v. San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986); *Wisconsin Winnebago Business Committee v. Koberstein,* 762 F.2d 613 (7th Cir. 1985); *Buxbom v. Naegele Outdoor Advertising Co.,* 739 F.2d 473 (9th Cir. 1984). In short, 25 U.S.C. § 81 does not require Indian tribes to obtain secretarial approval of management contracts, and the tribes have little incentive to seek such approval. Perhaps this explains why the Cabazon Tribe, although commencing its bingo operation in or around March 1983, JA 27, never sought or obtained secretarial approval during the pendancy of the operation. JA 64.

Additionally, the tribal amici briefs indicate that many tribes operate their own bingo games, rather than contracting with non-Indians for this purpose. See Oneida A.C. Br. 4 (Oneida Tribe); Chehalis A.C. Br. 9 (Leech Lake Band); Laguna A.C. Br. 3-4 (Northern Arapahoe Tribe); Laguna A.C. Br. 5 (Red Lake Band); Tulalip A.C. Br. 11 (Tulalip Tribe). Since these tribes do not have management contracts with non-Indians, the Secretary's guidelines do not apply to them in any event, since his guidelines apply only where he approves management contracts.

OCCA, on its face, prohibits tribal gambling operations in violation of state law. The Tribes argue that the OCCA does not apply, citing Ninth Circuit decisions incorporating the "civil regulatory-criminal prohibitory" distinction in the act. See *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); *Barona Group v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982); Tribes Br. 44-45. The more persuasive view, we believe, is found in the Sixth Circuit's recent decision in *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986), where the distinction was rejected as applied to the OCCA. Citing *Rice*, the Sixth Circuit noted that the OCCA and its legislative history contain "no indication" that the distinction applies. 796 F.2d at 188. Indeed, if the regulatory-prohibitory distinction were valid, the OCCA would be interpreted differently depending on whether it is applied on or off Indian reservations, since no serious argument can be made that the distinction applies in off-reservation cases. More importantly, whether or not the OCCA makes state gambling laws directly applicable on Indian reservations, the OCCA does not preempt state gambling laws as so applied, and expresses a general federal policy of deference to state gambling laws. As noted earlier, this Court held in *Rice* that the fundamental question is whether federal law preempts state law, not whether federal law authorizes the application of state law.[5]

The legislative history of the OCCA makes clear that the states have primary authority to regulate gambling and that federal law does not preempt state gambling laws. During the congressional debate, Senator Allott declared that:

> "The Federal Government will not attempt to preempt the field of gambling regulation under this legislation. Federal authorities will continue in their traditional role of cooperating with *local law enforcement officials who will continue to bear the primary responsibility in this area.*" 116 Cong. Rec. 35294 (1950) (remarks of Sen. Allott) (emphasis added).

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[5] The Tribes assert that California lacks standing to assert claims under the OCCA because the federal government has exclusive authority to prosecute such claims. Tribes Br. 45-46. Although we believe that California has at least limited enforcement authority under the OCCA, see State Br. 43 n. 26, the relevant point is that the OCCA establishes a federal policy in favor of the application of state gambling laws, whether or not the state has authority to prosecute such violations.

Thus, federal policy recognizes the "primary responsibility" of state and local authorities in the field of gambling regulation. Federal policy supports the application of State and local laws here, and in any case does not preempt their application.[6]

D. State Interest.

In our opening brief, we argued that the State interest is affected here in two ways. First, since the tribal games enable non-Indians to circumvent State gambling laws, the tribal games exploit and undermine California's general gambling policy. State Br. 15-16, 21. Second, since the tribal games are not regulated, they create substantial risks of organized criminal infiltration. *Id.* at 21, 25-29.

The Tribes argue that California has exaggerated the organized crime problem. They argue that bingo is a relatively harmless pasttime that is widely played. Tribes Br. 31-32; Laguna A.C. Br. 7-9. They note that California and other states authorize various forms of gambling and conduct statewide lotteries. Tribes Br. 41-42; Chehalis A.C. Br. 11, & Exh. A.

In our view, the Tribes have seriously underestimated the organized crime problem. The Commission on the Review of the

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[6] Some amici tribes argue that other federal laws provide sufficient protection of state interests on Indian reservations, principally 18 U.S.C. §§ 1152 and 1153, which make the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, applicable on Indian reservations. See, *e.g.*, *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950); Laguna A.C. Br. 28; Sandia A.C. Br. 23. Public Law 280, however, specifically provides that 18 U.S.C. §§ 1152 and 1153 do not apply in Public Law 280 states. JS App. 25. The apparent purpose of the exception is to ensure that Public Law 280 states have direct jurisdiction over Indian reservations, not simply to assimilate state laws into federal laws as applied on such reservations.

The Tribes also argue that the federal government has authority under other federal statutes to prosec e organized crime on Indian reservations, and that the federal government actually exercised this authority in *United States v. Dakota, supra*, 796 F.2d 186, and *United States v. Farris, supra*, 624 F.2d 240. Tribes Br. 30. In *Dakota* and *Farris*, the federal government, relying on the OCCA, did not prosecute organized crime, but instead sought to enjoin tribal casino operations that violated state gambling laws. Moreover, under the Tribes' view, the OCCA does not apply to tribal gambling operations in any event.

National Policy Toward Gambling has declared that "contrary to popular belief, bingo cannot be characterized as a parochial, low-stake game played by middle-aged and elderly women." State Br. 27. According to the commission, bingo "is, rather, a billion-dollar industry (much of it illegal) whose popularity permeates all aspects of American society, and the abuses of which often go undetected or unremedied." *Id.*[7] The California Attorney General's Task Force on Legalized Gambling and Organized Crime observed in 1967 that, when New York legalized bingo in 1958, "racket minded promoters inevitably infiltrated vulnerable organizations and received the lion's share of the profits," and that such abuses were eliminated only after New York adopted "stringent regulations and control." *Id.* at 28-29. Thus, unregulated bingo creates substantial organized crime risks, and to argue otherwise ignores the lessons of past experience.

To be sure, California does authorize or operate certain lotteries, specifically the State Lottery, parimutuel horse-race betting, and charitable bingo. See Cal. Govt. Code §§ 8880 *et seq.* (State Lottery Act); Cal. Bus. & Prof. Code §§ 19400-19667 (California Horse Racing Act); Cal. Pen. Code § 326.5 (charitable bingo). California, however, extensively regulates these lotteries to safeguard against organized crime risks. For example, the State Lottery Act establishes rules governing participation, disposition of revenues for educational purposes, and selection of lottery retailers. Cal. Govt. Code §§ 8880.52-8880.55, 8880-4, 8880.48. The act also establishes a lottery commission to oversee the lottery, whose members are appointed by the Governor and State Senate. *Id.* at 8880.15-8880.23. The act provides for investigation of violations and enforcement by law enforcement agencies. *Id.* at 8943-8952. Similarly, the California Horse Racing Act establishes a State agency to license horse racing operators; regulates racing hours and days; and provides for distribution of revenues. Cal. Bus. & Prof. Code §§ 19400-19667. The act specifically regulates parimutuel betting. *Id.* at §§ 19560, 19590-19598. The

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[7] The Tribes cite the commission's statement that it "perceives little difference between 'charitable bingo' and commercial bingo," Tribes Br. 40 n. 30, implying that Indian tribes should be as free to conduct commercial bingo as charities are to conduct charitable bingo. In context, however, the commission stated that *both* commercial and charitable bingo create organized crime risks, and therefore that the state should regulate *both* forms of bingo. JA 137-138.

act also provides for enforcement of the standards by law enforcement agencies. *Id.* at §§ 19660-19667. Charitable bingo is also subject to extensive regulation and control. Cal. Pen. Code § 326.5; see State Br. 24 n. 14. Charitable bingo must be conducted only by charitable organizations; the games must be operated only by members of the charitable organization; jackpots cannot exceed $250; and revenues cannot be commingled with other funds. *Id.*

The Tribes argue that their bingo operations comply with all requirements of California law except for requirements limiting size of jackpots and providing that the games must be operated by members of the charitable organization. Tribes Br. 6.[8] The main difference between tribal bingo and charitable bingo, however, is that charitable bingo is subject to state regulatory control and tribal bingo, under the Tribes' view, is not. This difference, more than the superficial similarities and differences cited by the Tribes, relates directly to the organized crime risk. A Department of Justice representative, testifying before Congress in 1984, stated that Indian tribes lack the "authority or resources to police these types of activities," and the tribes "do not have access to subpoena power or state criminal records that are just two of the many prerequisites to effective screening and auditing of a crimi-

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[8] The Tribes assert that the "average" prize awarded at the Cabazon reservation during a four-month period in 1984 was $184.89, less than the *maximum* prize authorized under State law. Tribes Br. 6, 41; JA 267. This figure is contained in an answer to interrogatories filed *after* the summary judgment motions were filed, and is undocumented and self-serving. It is not known how the Tribe calculated the figure, whether the period in question was representative, or even whether the figure represents the "average" or "mean" prize. In any event, it is irrelevant whether the Tribe's average prize is less than the maximum prize authorized under State law, since there is no necessary corrolation between the two. The figure has no relevance to the Morongo bingo operation, and the Tribes have failed to disclose the prizes awarded by that operation.

As noted in our opening brief, a State investigator has described the prizes advertised at the Cabazon bingo parlor during a random visit in 1984, and these prizes included cars, boats, and cash awards of thousands of dollars. State Br. 5 n. 2. Additionally, the Morongo games have advertised prizes of "[o]ver $2000 nightly" and "more than $5,000,000 in 1983." *Id.*

nal operation." State Br. 26 n. 16.[9] Further, Indian tribes, unlike State and local agencies, lack criminal jurisdiction over non-Indian patrons. See *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 208 (1978). Thus, state regulation is the main bulwark against organized criminal infiltration. Charitable bingo, unlike tribal bingo, is protected by this bulwark.

Indeed, the differences between charitable bingo and tribal bingo cited by the Tribes—involving size of jackpots and qualifications of operating personnel—relate directly to the organized crime risk. Because charitable bingo features only small jackpots, organized crime has little incentive to gain control of the games. Because charitable bingo must be operated by members of the charitable organization, organized crime has little opportunity to gain operational control. The tribal games, on the other hand, by featuring unlimited jackpots and utilizing non-tribal operating personnel, create risks of organized crime involvement not associated with charitable bingo. Indeed, the tribal games fail to meet other statutory requirements that lessen the organized crime risk, such as the requirement that state and local authorities can require revenues exceeding $5000 monthly to be used for other purposes. Cal. Pen. Code § 326.5(k)(4). Moreover, under the Tribes' view, the tribal bingo operations are legal regardless of whether or how much they comply with state law, and thus would be legal even if they failed to conform to state law in all major respects. In any event, the main difference between tribal bingo and charitable bingo is that the latter is regulated by the State and the former, under the Tribes' view, cannot be similarly regulated.

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[9] The Tribes state that on June 20, 1986—after this Court granted review—the Area Director of the BIA appointed a Cabazon security guard to exercise federal police authority over 32 Indian reservations in southern California, including the reservations involved here. Tribes Br. 31, & App. D. Since the officer was appointed pursuant to 18 U.S.C. § 3055, *id.*, which specifically relates to "suppression of liquor traffic," a question arises concerning the officer's authority over non-liquor violations. Assuming that the officer has such authority, it is doubtful that a single federal field officer with authority over 32 reservations will be able to undertake the screening and auditing procedures, among other things, that are necessary to prevent organized criminal infiltration.

E. Tribal Interest.

The main argument advanced by the Tribes and amici tribes is an economic one. They argue that bingo has enabled the tribes to obtain revenue for tribal programs and to increase employment opportunities for individual Indians. Tribes Br. 28-29; Seminole A.C. Br. 3-11; Sandia A.C. Br. 11-15; Oneida A.C. Br. 4-5; Tulalip A.C. Br. 8-16.[10] In *Colville,* however, this Court rejected an identical economic argument. The Court stated that the tribes' "primary argument is economic," and that the tribal smokeshops "generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations." *Colville,* 447 U.S. at 154. Still, the Court held that the tribes could not "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155. In effect, the Court held that tribal economic interests, however valid and compelling, must yield to state interests where Indian tribes market products to non-Indians in violation of state law, and where state law itself has created the market that the tribes seek to exploit. The same rationale applies here, where the Tribes attempt to market a gambling product that has value primarily because it is prohibited under California law.

The Tribes argue that the success of tribal commercial ventures depends on the tribes' ability to market products to non-Indians. Tribes Br. 12; Chehalis A.C. Br. 25. The Tribes are free, of course, to market products to non-Indians in conformity with state laws, and compete fairly with non-Indian enterprises for non-Indian patronage. Such commercial activity may not reap the phenomenal monetary rewards of tribal bingo—although it is not clear that such rewards are proportionate to the needs of individual tribes—but the tribes must recognize that unregulated bingo involving non-Indian patrons effectively exploits the state's own

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[10] The State and County attempted by written interrogatories to find out the amount of revenues generated by the bingo operations, but the Tribes refused to answer the questions on the ground that they were "irrelevant." See Response of Plaintiff Cabazon Band of Mission Indians to Interrogatories Propounded by County of Riverside and State of California, at 10 (Feb. 9, 1984). It is difficult to understand the relevance of the Tribes' economic argument if the amount of bingo revenues is "irrelevant."

gambling policy and is thus particularly offensive to legitimate state interests.

The states' concerns would be resolved in part if Congress were to enact legislation providing for federal regulation and control of the tribal games. In that event, although the tribes would still be exploiting state gambling policy, the current regulatory void would be eliminated and the organized crime threat would disappear. The Tribes thus have legislative remedies to pursue their economic interest. To date, Congress has not legislated in the matter other than enacting the OCCA, which makes state gambling laws applicable on Indian reservations. Unless Congress specifically legislates in favor of the tribal interest asserted here, the state interest in protecting the integrity of its gambling policy and in preventing organized criminal infiltration outweighs any tribal economic interests, however compelling.

II.

PUBLIC LAW 280 AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS IN THIS CASE.

A. The "Civil Regulatory-Criminal Prohibitory" Distinction.

Public Law 280 provides that state "criminal" laws, and state "civil laws . . . of general application to private persons and private property," shall have the "same force and effect" in Indian country as elsewhere in the state. 18 U.S.C. § 1162, 28 U.S.C. § 1360; JS App. 23-25. State and local gambling laws here are either "criminal" laws or "civil laws . . . of general application to private persons . . . ." Therefore, Public Law 280, on its face, provides that State and local gambling laws shall have the "same force and effect" on Indian reservations as elsewhere. This conclusion, as explained in our opening brief, is supported by the legislative history of Public Law 280, which shows that Congress intended to fully extend state civil and criminal jurisdiction over Indian reservations. State Br. 37-38.

The Tribes and amici tribes argue that this Court, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), distinguished between state "civil regulatory" and "criminal prohibitory" laws in determining state jurisdiction under Public Law 280. Tribes Br. 35-37; San Manuel A.C. Br. 16-30; Tulalip A.C. Br. 41-52. We believe that the Court's distinction is dictum, and that the distinction is

contrary to section 4(b) of Public Law 280, which prohibits state "regulation" of tribal property only where inconsistent with specific federal laws. State Br. 35, 36-37. Further, as explained in our opening brief, the distinction would create the anomaly that, although Public Law 280 was intended to *broaden* state jurisdiction over Indian reservations, the act would confer *less* jurisdiction than already exists under the common law balancing test. *Id.* at 35-36.

The Tribes argue that federal and state courts have often distinguished between state "civil" and "criminal" laws in other contexts, particularly in applying the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and in applying federal constitutional guarantees, such as the privilege against self-incrimination and the bar against double jeopardy. Tribes Br. 37. The ACA, however, which makes state criminal laws applicable on federal reservations, *specifically* includes only state *criminal* laws. See, *e.g., United States v. Best*, 573 F.2d 1095, 1098-1100 (9th Cir. 1978). Similarly, the constitutional guarantees relating to self-incrimination and double jeopardy *specifically* apply only in criminal proceedings. See, *e.g., United States v. Ward*, 448 U.S. 242, 248-251 (1980).[11] Obviously the Court must distinguish between "civil" and "criminal" laws where the applicable constitutional or statutory provision requires the distinction. Public Law 280, however, does not explicitly or implicitly make the distinction. Rather, Public Law 280 expressly makes both state "civil" and "criminal" laws applicable on Indian reservations, thus obviating any necessity to distinguish between civil and criminal laws.

The Tribes argue that the regulatory-prohibitory distinction, although not appearing in Public Law 280, is supported by public policy. Tribes Br. 33-35; Laguna A.C. Br. 18-24; Chehalis A.C. Br. 14; San Manuel A.C. Br. 18-24; Tulalip A.C. Br. 32-41, 59-60. The public policy, they argue, is manifested by this Court's decision in *Johnson v. Yellow Cab Co.*, 321 U.S. 323 (1944),

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[11] Also, the state court decisions cited by the Tribe involve state statutes specifically differentiating between "regulation" and "prohibition." See *City of Shreveport v. Belk*, 258 So.2d 79, 80-81 (La. 1972) (state statute authorizing political subdivisions to "regulate but not prohibit" beer sales); *Blumenthal v. City of Cheyenne*, 186 P.2d 556, 565-567 (Wyo. 1947) (state statute authorizing municipalities to "regulate" traffic); Tribes Br. 37.

where Oklahoma argued that the Assimilative Crimes Act made Oklahoma liquor laws applicable to liquor shipments to federal military reservations. Laguna A.C. Br. 18-24; Tulalip A.C. Br. 59-60. Although the Court did not decide that issue, it stated in a footnote that a "strong argument" can be made that Congress did not intend to require federal military officials to acquire state "permits" as a condition for such liquor shipments. 321 U.S. at 380 n. 8. Perhaps more direct authority for the tribal view is found in this Court's decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *Environmental Protection Agency v. California (EPA)*, 426 U.S. 200 (1976), where this Court held that the Clean Air Act and Clean Water Act do not require federal agencies to obtain state permits. In *Hancock* and *EPA*, the Court distinguished between state "substantive" laws—which were held applicable to federal agencies—and state "procedural" laws, which were held not applicable.

Distinctions between state "substantive" and "procedural" laws, or between state "regulatory" and "prohibitory" laws, perhaps might have more validity where, as in *Hancock*, *EPA* and *Yellow Cab*, the question was whether state laws apply to federal facilities that are subject to a panoply of other federal regulatory laws. Under these circumstances, the inapplicability of state law does not create a regulatory void. In *Hancock* and *EPA*, for example, federal facilities causing pollution were still subject to the regulatory provisions of the Clean Air Act and Clean Water Act. Similarly, in *Yellow Cab*, the Oklahoma military reservation was still subject to federal statutes and regulations governing shipment, distribution, and use of liquor on military reservations. To apply this distinction here, however, would create a regulatory void not existent in *Hancock*, *EPA* and *Yellow Cab*. As noted above, Congress has enacted no legislation regulating tribal bingo games, and the Secretary of the Interior does not regulate the games. Thus, unless state laws apply, the tribal games are not subject to any regulatory controls other than those that are self-imposed. The Tribes' policy argument, although arguably valid where federal facilities are involved, has little merit here.

The regulatory-prohibitory distinction, except where based on a reasonably clear expression of congressional intent, appears to be a form of federal common law, in that it is "not explicitly or clearly found in federal statutory or constitutional command." See Hart & Wechsler, THE FEDERAL COURTS AND THE FED-

ERAL SYSTEM 770 (2d ed. 1973). Although it is appropriate to adopt common law where Congress has not spoken—indeed, the common law balancing test applied in *Rice* was adopted for this reason—it is less justifiable to adopt common law distinctions in construing federal statutes, since the primary federal lawmaking power reposes in Congress rather than the courts. See *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981). Perhaps for this reason, this Court has recently indicated its reluctance to make such distinctions. See *Rice*, 463 U.S. at 730 n. 13, 734 n. 18 ("[I]n the absence of a context that might possibly require it, we are reluctant to make such a distinction"); compare *California v. United States*, 438 U.S. 645 (1978) (holding that Reclamation Act of 1902 requires federal agencies to acquire state water rights permits), with *EPA v. California, supra*, 426 U.S. 200 (holding that Clean Water Act does not require federal agencies to acquire state water quality permits). See also *Ferguson v. Shrupa*, 372 U.S. 726, 732 (1963) ("Nor are we able or willing to draw lines by calling a [state] law 'prohibitory' or 'regulatory' ").

The Tribes argue that the regulatory-prohibitory distinction is not "unworkable" because it simply distinguishes between state laws that "put a stop" to an activity and those that allow the activity to "go on within the bounds of prescribed rules, restrictions, and limitations." Tribes Br. 38, quoting from *Ajax v. Gregory*, 32 P.2d 560, 563 (Wash. 1934). It is often difficult, however, to determine whether a state law is intended to "stop" an activity or allow it to conditionally proceed. The conditions attached to a general prohibition may embody state policy more than the prohibition itself, just as exceptions often swallow up a general rule. Minnesota notes in its amicus brief that Minnesota's narcotics and dangerous weapons laws may be considered "civil regulatory" because they allow narcotics and dangerous weapons to be possessed and sold under prescribed conditions. Minn. A.C. Br. 18. If so, the Tribes' argument would mean that states lack jurisdiction to prohibit sales of narcotics and dangerous weapons on Indian reservations. It cannot be imagined that Congress intended such a result in enacting Public Law 280.

B. Application of the "Civil Regulatory-Criminal Prohibitory" Distinction.

The difficulties of applying the regulatory-prohibitory distinction are evident in this case. The Tribes argue that California gambling laws are "regulatory" because California authorizes

bingo for charitable purposes. Tribes Br. 37-42. The purpose of California law, however, is not simply to prefer charitable bingo over commercial bingo as a socially acceptable activity. Rather, its purpose is to prohibit gambling except where regulated and controlled by State of local authorities, because organized crime has been shown to grow where not adequately regulated by local authorities. State Br. 22-24. California policy, then, is affected not by the type of gambling activity involved, but rather by whether it is sufficiently controlled by State of local standards backed by the State's law enforcement apparatus. In short, California absolutely prohibits unregulated gambling and makes no exceptions. Thus, California gambling laws are "prohibitory" rather then "regulatory," assuming the validity of the distinction.

This Court has often held that the states have general power to define crimes and offenses in our federal system, subject to Congress' power to define crimes under federal law. See *Rochin v. California*, 342 U.S. 165, 168 (1952); *Knapp v. Schweitzer*, 357 U.S. 371, 376 (1958). Principles of federalism thus require deference to state laws defining whether gambling enterprises are criminal or not. The same principles should apply to state laws relevant to tribal gambling enterprises, assuming that such state laws are applied in a uniform and nondiscriminatory manner.

C. Applicability to Indian Tribes.

The Tribes argue that Public Law 280 does not provide for state jurisdiction over Indian tribes, as opposed to individual Indians. Tribes Br. 33-35. Nothing in Public Law 280 or its legislative history supports this limitation. Public Law 280 makes state laws broadly applicable "within . . . Indian country" and makes no exceptions for Indian tribes. JS App. 23. The Tribes' argument is inconsistent with the purpose of Public Law 280 to broaden state jurisdiction over Indian reservations. See note 3, *supra*. The argument would allow tribal commercial enterprises to operate free of constraints applicable to individual Indian enterprises, even though both may equally impair state interests or promote tribal welfare. The distinction is not supported by the language or policy of Public Law 280 and should be rejected.

D. Tribal Card Games.

Finally, the Tribes argue that Riverside County cannot apply its card parlor ordinance to the Cabazon card games. Tribes Br. 47-50. Both the common law balancing test and Public Law 280

support the application of the ordinance. Under the balancing test, the tribal activity depends on non-Indian patronage, and no federal law preempts the ordinance. Therefore, under *Rice*, the Tribe has no "vested right" to conduct the activity. *Rice*, 463 U.S. at 721, & n.7. Public Law 280, in providing for the application of the "civil laws of such State . . . that are of general application to private persons or private property," JS App. 23, clearly encompasses local ordinances. County ordinances, under both California law and the laws of other states, are part of the body of state law. See *e.g., County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909 (1906); *City of San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 281, 58 Pac. 699 (1899); Restatement, *Conflicts* § 2b. Moreover, the legislative history of Public Law 280 clearly indicates that the act includes local ordinances.[12] Therefore, under both the common law and the statute, the Riverside County ordinance is applicable here.

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[12] According to the congressional reports accompanying H.R. 1063, which became Public Law 280, the BIA contacted "State and *local authorities*" to determine their willingness to assume jurisdiction over Indian reservations. S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83d Cong., 1st Sess. 5 (1953) (emphasis added). Nevada was not given jurisdiction under the enactment because "authorities of some *counties* have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying Federal subsidy." *Id.* at 6 (emphasis added). Appended to the Senate report was a letter from the Assistant Secretary of the Interior stating that the BIA had consulted with "State and *local* authorities" in the affected states; that "State and *local* authorities" were agreeable to the transfer of jurisdiction; that "some of the counties" in Nevada were opposed to the transfer of jurisdiction; and that the BIA had not consulted with "State and *local* authorities" in states other than those specifically mentioned. *Id.* at 6-7 (emphasis added). Finally, the Senate report noted that the proposed transfer of jurisdiction was consistent with other pending legislation that would transfer responsibility for certain Indian health and welfare programs to a "State, *county, or municipal subdivision* . . . ." *Id.* at 4 (emphasis added). Thus, the legislative history unequivocally shows that Public Law 280 includes local ordinances.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the decision below.

Respectfully submitted,

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October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, NEVADA AND NEW MEXICO

AS AMICI CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

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No. 85-1708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, NEVADA AND NEW MEXICO AS AMICI CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

INTEREST OF THE AMICI CURIAE

The interest of the Amici Curiae States in support of the State of California lies in their desire to have clarified the confused and unsettled state of the law with regard to gambling activities in areas of Indian country situated within the States. Specifically, it is the concern of the Amici Curiae States, consisting of jurisdictions wherein Pub.L. 83-280 (hereinafter "Pub.L. 280") is not generally applicable, that the question presented in this case be resolved in a manner upholding the jurisdiction of all States, whether or not possessed of jurisdiction under Pub.L. 83-280 to enforce

their laws against unauthorized gambling throughout the States. [1]

Each of the Amici Curiae States has one or more areas of Indian country included within its boundaries wherein various forms of gambling activities are either presently being conducted or eventually could be conducted. These activities include bingo, parimutuel jai alai, parimutuel horse and/or dog racing, lotteries, keno, video gaming machines, and full-scale casino operations. All of these activities, as conducted, either are or would be in derogation of one or another of the Amici Curiae States' laws. [2]

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[1] Pub.L. 280 is codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 and grants to several states, including California, certain civil and criminal jurisdiction over Indians within areas of Indian country located in the named States. Although Pub.L. 280 is not of general application in the Amici Curiae States, the rationale of the decision in the present case raises various questions with regard to Indian country gambling activities in both Pub.L. 280 States and non-Pub.L. 280 States.

[2] For example, it is the position of the Amici Curiae State of Arizona that a parimutuel jai alai fronton proposed near Phoenix would violate Ariz. Rev. Stats. Ann. § 13-3307.A:

> "Subject to the exceptions contained in [Ariz. Rev. Stats. Ann.] § 5-112 [parimutuel horse, horse harness and dog racing], no person may engage for gain, hire, reward or profit in the business of accepting, recording or registering any bet, purported bet, wager or purported wager or engage for gain, hire, reward or profit in the business of selling wagering pools or purported wagering pools with respect to the result or purported result of any sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever."

With regard to video gambling devices being used at Indian country bingo operations near Phoenix and Tucson, the Amici Curiae State of Arizona's position is that they are in violation of Ariz. Rev. Stats. Ann. § 13-3302:

> "A person who knowingly deals, carries on, opens or causes to be opened, or who conducts, either as owner, proprietor or employee, whether for hire or not, any slot machine, punchboard or machine of like character, whether played for money, checks, credits or other representative of value is guilty of a class 2 misdemeanor."

The grave potential for the erosion of the legitimate law enforcement objectives and powers of both Pub.L.280 States, such as California, and non-Pub.L. 280 States, such as the Amici Curiae, with regard to gambling operations in Indian country within their borders, coupled with the dangers that gambling which is unregulated by the States poses to the health, safety and welfare of their residents, motivates the Amici Curiae States to urge reversal of the decision of the United States Court of Appeals for the Ninth Circuit herein.

SUMMARY OF ARGUMENT

The reasoning and rationale of this Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983) should be applied to the factual and legal issues in the present case. Notions of tribal sovereignty and self-government which have evolved in other areas of Indian law should not be applied in the present case in a manner which results in the wholesale disregard for the legitimate law enforcement objectives and concerns of the States. The right of an Indian tribe to make its own laws "and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), cannot properly be transformed into a mechanism by which Indian country gambling activities, catering almost exclusively to non-Indian, non-tribal member residents of the States, are permitted to operate in such a fashion as to allow non-Indian State residents to gamble in ways that are in violation of otherwise applicable State laws.

The legislative history of Pub.L. 280 (18 U.S.C. § 1162 and 25 U.S.C. § 1360) and the "Assimilative Crimes Act" (18 U.S.C. § 13) strongly supports the conclusion that the reasoning of this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976) is not properly applied to the "civil/regulatory - criminal/prohibitory" dichotomy which informs the Indian country gambling analysis of the lower court opinion herein. The legislative history of the cited federal laws is replete with indicia that Congress intended to include within the scope of both Pub.L. 280 and 18 U.S.C. § 13 the penal enforcement provisions of State laws otherwise characterized as "civil/regulatory".

Finally, it is the position of the Amici Curiae States that, in any event, even if the lower court opinion be affirmed, this Court's decision should be confined to the gambling activities under consideration in the State of California and not be extended by implication to other gambling operations conducted or proposed to be conducted elsewhere, particularly in States, such as the Amici Curiae States, where Pub.L. 280 does not generally apply.

ARGUMENT

I

The Rationale of Rice v. Rehner Should Control

It is the position of the Amici Curiae States that the reasoning of the decision in *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986) is fundamentally flawed and must be rejected. This Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983) compels the conclusion that the lower court ruling herein must be reversed.

To begin with, this Court held in *Rice*, *supra*, that the State of California could properly require a federally-licensed Indian trader to obtain a State liquor license prior to selling liquor for off-premises consumption. In so concluding, this Court inquired into whether there existed a tradition of tribal sovereign immunity from such state action, noting that if no such tradition exists or if it can be found that the balance of State, Federal and Tribal interests so requires, traditional preemption analysis would "accord less weight to the 'backdrop' of tribal sovereignty." *Rice*, *supra*, 463 U.S. at 720.

Although the analysis in *Rice*, *supra*, focused primarily upon the provisions of 18 U.S.C. § 1161 regarding the regulation of liquor in Indian country, the rationale of the decision has clear application herein. This conclusion is compelled because Indian tribes enjoy no historical tradition of conducting high-stakes commercialized gambling operations which cater to a transient, non-Indian/non-tribal

member clientele and which exist *only* because such gambling operations offer that which is prohibited beyond Indian country. [3]

Although this Court recognized that the principles of tribal "self-government" articulated in *Williams v. Lee*, 358 U.S. 217 (1959) generally operate to insulate reservation Indians from State laws, it also observed that, although in Indian matters Congress usually acts upon the assumption that the States have no power to regulate the affairs of Indians in Indian country, "that assumption would be unwarranted in the narrow context of the regulation of liquor." *Rice, supra*, 463 U.S. at 723. The same conclusion should obtain with regard to Indian country gambling operations. In this regard, this Court then held that since there is no tradition of sovereignty immunity favoring the Indians with regard to liquor regulation and since the activity there in question "potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case." *Rice, supra*, 463 U.S. at 725.

In examining the canons of construction which hold that, in general, state laws are inapplicable to reservation Indians unless Congress expressly so states and that ambiguities should be resolved in favor of the Indians, this Court quoted from its prior decision in *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), stating that "[a] canon of

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[3] The Ninth Circuit opinion recharacterized the "tradition" issue as being whether a tribe "is engaged in a traditional governmental function, not whether it historically engaged in a particular activity." *See Cabazon, supra*, 783 F.2d at 906. The court then found that since the tribes were engaged in the "traditional governmental function of raising revenue," they were exercising their "inherent sovereign governmental authority." Id. The mere revenue-generating potentials of a particular activity cannot properly, under the claim of tribal "sovereign governmental authority", legitimize violations of otherwise applicable State laws, particularly where substantial numbers of non-Indians and non-tribal members are involved. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

construction is not a license to disregard clear expressions of congressional intent." *Rice*, *supra*, 463 U.S. at 733.

As will be amply demonstrated hereafter, Congress appears clearly to have expressed its intention that, through the enactment of Pub.L. 280, States subject to said law were empowered to exercise not only purely "criminal/prohibitory" state laws within Indian country, but also the penal sanction components of State laws otherwise characterized as "civil/regulatory" in their general nature. To the extent that the decision in *Bryan*, *supra*, concludes that Pub.L. 280 does not grant civil substantive authority to impose state taxes upon reservation Indians within Indian country, it is plainly distinguishable.

In this regard, a State law requiring that taxes be paid implicates entirely different concerns than does a State law prohibiting or punishing specified gambling activities. The unique historical facts and the decisions of this Court relating to the immunities of tribal member Indians from taxation by the States have no parallel or counterpart vis-a-vis Indian country gambling activities. In point of fact, the notion that the rationale supporting tribal immunities from State taxes is properly extrapolated to similarly insulate Indian gambling operations has already been rejected, with an appeal to this Court on the point having been dismissed for want of a substantial federal question. *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.Sup.Jud.Ct. 1983), *appeal dismissed* 464 U.S. 923 (1983). [4]

Indeed, as even the dissent in *Rice*, *supra*, notes, unlike liquor transactions (which are regulated consistent with existing laws relating thereto, *see* 25 C.F.R. § 140.18), gambling and drug sales are prohibited at licensed Indian

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[4] While the dismissal of an appeal for want of a substantial federal question suggests concurrence with the judgment of the lower court, but not necessarily its reasoning, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), it is still a ruling on the merits. *Hicks v. Miranda*, 422 U.S. 332, 345 (1975).

trader premises. *See Rice*, *supra*, 463 U.S. at 736 (Blackmun, J., dissenting). [5]

Accordingly, in an area as controversial as Indian country gambling, it is the view of the Amici Curiae States that the reasoning and rationale of *Rice*, *supra*, presents the only logical analysis possible. Any other course of action at this point in time can only be viewed as an invitation to further conflict.

II

Notions of Tribal Self-Government Are Not Dispositive of the Gambling Issues Herein

The doctrine which is perhaps most frequently invoked in support of Indian country gambling activities is that of the tribal sovereign right of "self-government." Its most succinct definition is probably found in *Williams v. Lee*, *supra*, where this Court held that, in examining the nature of the jurisdictional relationship between the States and the Indian tribes, the essential inquiry, absent governing federal laws, was whether the state action infringed on the right of reservation Indians "to make their own laws and be ruled by them." *Williams*, *supra*, 358 U.S. at 220.

Under this principle, Indian tribal governments possess the power to enact measures to govern their members with regard to purely internal tribal matters. *See, e.g., Fisher v. District County Court*, 424 U.S. 382, 386 (1976). Furthermore, this Court has recently affirmed the power of Indian tribal governments to impose taxes upon non-Indian,

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[5] It is also noteworthy that the dissent in *Rice*, *supra*, cites and relies upon *Bryan*, *supra*, for its conclusion that California's jurisdiction over Indian country under Pub.L. 280 does not include general civil regulatory authority. This hypothesis misses the point: even under the "civil/regulatory - criminal/prohibitory" dichotomy, discussed in Argument III, *infra*, the distinct penal sanctions of state laws in a general scheme otherwise characterized as "civil/regulatory" are not properly labeled exclusively "civil", but must be viewed as also being partially "prohibitory" in nature.

non-tribal member business operations within their boundaries. *Kerr McGee Corp. v. Navajo Tribe of Indians*, _____ U.S. _____, 105 S.Ct. 1900 (1985).

On the other hand, similar arguments based upon the purported controlling force of notions of self-government have been rejected or severely restricted by this Court when external tribal relationships are involved. For example, this Court has recently held that, where significant off-reservation effects of on-reservation activities involving non-Indians occur or may be anticipated to occur, and absent federal preemption, it is appropriate to employ a "balancing test" to measure whether the state action involved constitutes an infringement upon tribal self-government. *Rice*, *supra*, 463 U.S. at 720-725. Moreover, in situations where tribal governments have relied upon the principle of self-government to, in effect, "market an exemption" from otherwise applicable state laws which would clearly and properly bind the State's non-Indian populations, this Court has rejected such tribal efforts, even if to do so results in substantial economic hardship to the tribes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) [6]

The point of the foregoing, however, is that if tribal "self-government" is synonymous with the right to "make their *own* laws and *be* ruled by them," (emphasis added) as enunciated in *Williams v. Lee*, *supra*, then this Court's use of the subjunctive mood (*i.e.*, "*be* ruled") cannot properly be

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[6] The Ninth Circuit decision herein rejected the reasoning of *Colville*, *supra*, upon the grounds, *inter alia*, that the Indians' interest in generating tribal revenues outweighed California's interest in "protecting against the *potential* for intrusion of organized crime." (emphasis in original). *Cabazon*, *supra*, 783 F.2d at 905. Under such a rationale, unfortunately, the States are presumably not only powerless to act to protect their citizens from such intrusions *before* they occur, they are required to wait until the "potential" evolves into reality and then, belatedly, attempt to remedy that which they had previously been forbidden to prevent. Surely this cannot be viewed as a rational federal policy toward *any* of the States, much less a Pub.L. 280 State such as California.

metamorphasized into an authorization for tribal governments to dictate to the States that non-Indian and non-tribal member residents of such States may, with impunity, venture onto reservations as transitory visitors to engage in activities *within* Indian country which are prohibited to *all* residents — tribal member and non-tribal member alike — within the State *beyond* Indian country. [7]

Stated otherwise, the right of Indian tribal governments to make their own laws and be ruled by them should neither be transformed nor allowed by this Court to be transformed into a mechanism by which the very acts declared by the States through their freely-elected representatives to be against their public policies — and punishable as such — may be wholly disregarded by non-Indian, non-tribal member residents of the States who merely visit the reservations to gamble. While the power of Indian tribal self-government may be a legitimate force in effectuating the goals and objectives of Indians in their reservation internal affairs, it cannot properly be wielded in a fashion which not only disregards but also directly contravenes the laws and public policies of the surrounding States.

III

The "Civil/Regulatory - Criminal/Prohibitory" Dichotomy Must Yield To The Legislative History of the Assimilative Crimes Act and Pub.L. 83-280

As previously noted, the Amici Curiae States consist of jurisdictions where, in general, Pub.L. 280 is not in effect. Nonetheless, the sweep and impact of the lower court ruling herein raises questions which, in the absence of a reversal by this Court, will continue to frustrate and complicate the law enforcement concerns of all States in the Union having

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[7] Indian country, of course, remains a part of the States within which it exists, save only that in non-Pub.L. 280 States, State laws may have little or no application to *Indians* residing within such areas. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). Certainly no less extensive jurisdiction should be found in Pub.L. 280 States such as California.

Indian country within their borders. Thus, the Amici Curiae States' position is that an examination of Pub.L. 280, as it relates to Indian country gambling from the perspective of non-Pub.L. 280 States, may be of assistance in the resolution of the issues.

Turning to the central issue, lodged firmly at the heart of the Ninth Circuit opinion herein is the proposition that, in a Pub.L. 280 State, if a law exists which may be characterized as "civil/regulatory" in its general nature, as opposed to "criminal/prohibitory," then it cannot be applied within Indian country in such State insofar as Indians and tribal gambling activities are concerned. It is the position of the Amici Curiae States that the Ninth Circuit decision herein should be held invalid as to Pub.L. 280 States as well as invalid and, even if not invalid as to such States, inapplicable in non-Pub.L. 280 States.

To begin with, the Ninth Circuit opinion herein argues that tribal rights of "self-government" regarding gambling override competing or inconsistent State interests because, in States such as California, only "criminal/prohibitory" State laws, rather than "civil/regulatory" State laws, were made applicable by Pub.L. 280. [8] At this juncture, therefore, a brief examination of the logic as well as the conceptual foundations of the dichotomy may be helpful.

As a preliminary matter, and from a purely logical and intellectual standpoint, the "civil/regulatory - criminal/prohibitory" dichotomy as applied to Indian country gambling activities offers too simplistic and mechanical a

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[8] Other decisions adopting the "civil/regulatory - criminal/prohibitory" dichotomy include, *e.g.*, *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983) and *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982). Decisions rejecting the distinction include, *e.g.*, *United States v. Dakota*, _____ F.2d _____ (No. 85-1568, 6th Cir. July 18, 1986) and *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.Sup.Jud.Ct. 1983), *appeal dismissed* (for want of a substantial federal question), 464 U.S. 323 (1983).

solution to the problem. While it may be true that the general activity is regulated by the State primarily as a civil matter, it is a plain non sequitur to conclude that specific state laws intended to regulate the civil general activity with penal enforcement sanctions are also strictly "civil" in nature.

To do so, in effect, is to engage in semantic gymnastics, since by its intrinsic nature the essence of a "regulatory" measure includes not only authorizations of but also limitations upon activities and human behavior, with enforcement accomplished by prohibitions upon activities or behavior which either exceed or circumvent those authorizations and limitations. Thus, *any* regulatory measure must be viewed as an aggregation of authorizations, limitations, prohibitions and penal sanctions. This principle is ignored by the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*.

Furthermore, under the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, even indisputably appropriate State penal laws could be characterized as "civil/regulatory" and thus purportedly unenforceable against Indians within Indian country. For example, although the licensing and regulation of drivers and the operation of motor vehicles is essentially "civil/regulatory" in nature, the rationale of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, would arguably render enforcement of state speed limit laws or drunk driving laws by State officers (in Pub.L. 280 States via 18 U.S.C. § 1162) or Federal authorities (in non-Pub.L.280 States via 18 U.S.C. § 13) impossible within Indian country vis-a-vis Indians. This makes no sense in the area of traffic law enforcement and it makes even less sense when superimposed over the area of Indian country gambling, which, after all, is specifically intended to cater to a non-Indian gambling clientele.

The fundamental infirmity which burdens the "civil/regulatory - criminal/prohibitory" dichotomy insofar as Indian country gambling activities is concerned lies in its

refusal to recognize that *any* collection of State laws which, in the aggregate, forms a regulatory scheme which is civil in its general nature must by definition also include penal or prohibitory enforcement components. Otherwise, the State's regulatory objectives and policies will be rendered completely illusory and unattainable.

Thus, even assuming the propriety of the questionable hypothesis that, under Pub.L. 280 and related similar laws (*e.g.*, 18 U.S.C. § 13, the "Assimilative Crimes Act", applicable in non-Pub.L. 280 States) Congress intended to include only a State's exclusively "criminal/prohibitory" laws, the inclusion of the penal or prohibitory enforcement components of systems otherwise characterized as "civil/regulatory" seems clearly to be intended. Without exception, each of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, reached their contrary conclusions based either upon dictum in this Court's opinions or upon demonstrably incorrect and incomplete analysis.

Whether they be Pub.L. 280 or non-Pub.L. 280 jurisdictions, it makes no sense to dictate to the States that under the rubric of the dichotomy they must choose either between permitting limited, regulated gaming activities in the State or repealing all such State laws and prohibiting all such gaming as the only effective means of preventing the abusive practices which have characterized various Indian country gaming operations. In this regard, the "balancing of interests" test adopted by this Court in *Rice*, *supra*, teaches that a proper accommodation of the objectives and concerns of the Indian tribes and the States may be realized through the sanctioning of Indian country gaming operations, but only pursuant to the provisions of otherwise applicable State and Federal laws. [9]

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[9] Other federal provisions bearing upon these issues include, *e.g.*, 15 U.S.C. § 1175 (gambling devices, as defined in 15 U.S.C. § 1171, prohibited in Indian country), and 25 C.F.R. § 140.21 (gambling, by dice, cards, "*or in any way whatever*," (emphasis added) is strictly prohibited in any licensed trader's store or on the premises).

Turning to the origins of the dichotomy insofar as Indian country gambling activities are concerned, the catchphrase "civil/regulatory - criminal/prohibitory" seems to have originated in the District Court decision in *Seminole Tribe of Florida v. Butterworth*, 491 F.Supp. 1015 (S.D.Fla. 1980), *affirmed* 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982). There, in upholding tribal bingo operations, the District Court turned to an analysis of Pub.L. 280, stating that "[a]s a preliminary matter, however, the court will have to determine if Florida's statute [*i.e.*, Fla. Stat. § 849.093 governing bingo games] can be classified as criminal/prohibitory or civil/regulatory." *Butterworth*, *supra*, 491 F.Supp. at 1018.

The District Court then turned to the decision in *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977), which it characterized as being "particularly helpful in this determination." *Butterworth*, *supra*, 491 F.Supp. at 1019. Although the Assimilative Crimes Act does not directly apply in Indian country within Pub.L. 280 States, it continues to apply in non-Pub.L. 280 States such as the Amici Curiae States. Moreover, as will be discussed in greater detail, *infra*, many conceptual parallels exist between

Pub.L. 280 and the Assimilative Crimes Act, making an examination of both prudent. [10]

In *Marcyes*, *supra*, it was held that the federal Assimilative Crimes Act, 18 U.S.C. § 13, applied to prohibit the sale of fireworks by Indians to the general public, including non-Indians, on the Puyallup Indian Reservation located in East Tacoma, Washington. While the court rejected the Indians' argument that 18 U.S.C. § 13 was inapplicable to their activities, in so ruling it also suggested

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[10] Certain legal commentators have suggested that despite this Court's decision in *Williams v. United States*, 327 U.S. 711 (1946), it is doubtful that Congress intended that the Assimilative Crimes Act, 18 U.S.C. § 13, be applied to Indian country at all. *See, e.g.*, F.Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 293 n. 95. However, the legislative history reveals that Congress was well-aware of and intended to perpetuate the *continued* applicability of the Assimilative Crimes Act to all Indian country in non-Pub.L. 280 States. *See* 86 Cong.Rec. H1626 (daily ed. Feb. 19, 1940) and House Report 1584, 76th Cong., 3d Sess. accompanying H.R. 7018, which amended 18 U.S.C. § 468, the Assimilative Crimes Act. The following colloquy occurred at that time between Congressmen Celler, Case and McLaughlin:

"Mr. Case of South Dakota. 'Will the gentleman state what part of the Federal law this applies to? Is this the section that adopts the State codes with regard to penalties for various crimes on federal reservations, *including Indian reservations*?'

"Mr. McLaughlin. 'The gentleman is correct.'

"Mr. Case of South Dakota. 'This merely brings this up to date, accepting the State codes?'

"Mr. McLaughlin. 'It simply brings the present law up to date; that is correct. It extends the time for the application of the law.'

"Mr. Celler. 'We have passed these bills almost every session.' " (emphasis added).

Congressman Celler, who sponsored H.R. 7018, noted in his report (*i.e.*, H.R.Rep.No. 1584, *supra*, at 1-2) that the purpose of the law was to update federal law to bring it current with the laws in effect in the States where the reservations were located and would "make no other change *in existing law*." (emphasis added). As the bill's sponsor, Congressman Celler's comments constitute an "authoritative guide to the statute's construction." *Rice*, *supra*, 463 U.S. at 728.

that, for Assimilative Crimes Act purposes, certain dictum in this Court's opinion in *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389 n. 8 (1944) arguably supported the contention that Congress had not intended to include the penal provisions of a state regulatory system within the ambit of the Act. *Marcyes, supra*, 557 F.2d at 1364.

In *Johnson, supra*, this Court was collaterally presented with the issue of whether 18 U.S.C. § 468 (the federal assimilative crimes statute in existence in 1943) assimilated Oklahoma liquor laws vis-a-vis the federal military reservation at Fort Sill, Oklahoma. A close reading of the case, however, reveals that this Court declined to rule on the question. *Johnson, supra*, 321 U.S. at 390-391.

Footnote 8 of the opinion (*see Johnson, supra*, 321 U.S. at 389 n. 8) offers that had it been the intent of Congress to assimilate the penal provisions of a State "civil/regulatory" system, it would have considered the problem and used more express language. In a well-reasoned dissent, Mr. Justice Frankfurter, joined by Mr. Justice Roberts, expressed the view that the Assimilative Crimes Act statute, 18 U.S.C. § 468, clearly applied. *See Johnson, supra*, 321 U.S. at 398-403 (Frankfurter, J. dissenting).

Moreover, that this Court's observations in footnote 8 in *Johnson, supra*, were dictum is clear: this Court specifically declined to rule on the point, declaring it to be "collateral to the principal issue of the legality of the seizure of the liquor." *Johnson, supra*, 321 U.S. at 391. However, the court in *Marcyes, supra*, avoided direct reliance upon the dictum by finding that the Washington fireworks law was "a prohibitory rather than a regulatory law." *Marcyes, supra*, 557 F.2d at 1364.

Thus, wholly apart from the nature of the said footnote as dictum, the court in *Marcyes, supra*, similarly avoided deciding the issue, thereby generating its own dictum and calling into question the logic of reliance upon the decision for the proposition that, insofar as the Assimilative Crimes Act is concerned, only a State's exclusively "criminal/

prohibitory" laws, and not its "civil/regulatory" laws, even if coupled with penal sanctions for violations, were intended by Congress to be subject to assimilation under 18 U.S.C. § 13.

Furthermore, as to the hypothesis of footnote 8 in *Johnson*, *supra*, that, had Congress intended to subject to assimilation both purely criminal state laws as well as regulatory laws (with penal sanctions), it would have more clearly articulated its intent, a close examination of the legislative history reveals that such is precisely what Congress did.

To begin with, and as acknowledged in *Marcyes*, *supra*, 557 F.2d at 1364, Congress sought to draw within the reach of 18 U.S.C. § 13 "*any* act or omission" (emphasis added) which, although not made punishable by any enactment of Congress would be punishable if committed or omitted within the jurisdiction of the State in which the federal area was located. The use of the terms "any act or omission" seems to encompass far more than just State prohibited criminal acts. Had Congress intended that only State "criminal/prohibitory" laws which were wholly unrelated to "civil/regulatory" systems were to be subject to assimilation, it would have so stated.

However, instead of providing that assimilation would occur only if a person were "guilty of a *crime* which, although not made punishable by any enactment of Congress," the broader phraseology "any act or omission" was selected. This fact alone demonstrates that Congress appeared to have specifically intended this broader reach of the Assimilative Crimes Act. Indeed, there appears to be nothing in the legislative history of the law to support the conclusion that Congress intended to differentiate or exclude from the scope of the law State statutes which serve as

enforcement mechanisms in systems which might otherwise be viewed as civil/regulatory in nature. [11]

For example, in both 1932 and 1933, Congress had before it bills proposing amendments to Sec. 289 of the Federal Criminal Code (*i.e.*, 18 U.S.C. § 468), the then-existing assimilative crimes statute. [12] On March 31, 1932, and in support of H.R. 10589, Congressman Sumners, on behalf of the House Committee on the Judiciary, submitted House Report 959 to the full House. [13] Appended to and incorporated as a part of the Judiciary Committee's report was a December 9, 1931 letter from United States Attorney General William D. Mitchell to the then-serving Chairman of the Committee, Congressman George W. Norris, supporting the amendment.

In describing the reach and operation of the assimilative crimes statute, the Attorney General explained that under the statute, the commission "of *any* act, not made penal by any law of Congress . . . may be punished under *any* State law making such act penal." (emphasis added). [14]

The Attorney General then observed:

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[11] *See, e.g.*, Note, THE FEDERAL ASSIMILATIVE CRIMES ACT, 70 Harv.L.Rev. 685, 696 (1957):

"*[The Assimilative Crimes Act] offers no support for the exclusion of state regulatory statutes*, since it specifically provides for the punishment of 'any act or omission . . . punishable . . . within the jurisdiction of the State. . . .' (Emphasis added.) *Congress has nowhere indicated that it differentiates between regulatory and other laws and there would seem to be little reason to exclude state laws which would be of use in regulating conduct within the enclaves, despite the fact that the lack of appropriate federal administrative facilities may make comprehensive enforcement impossible.* Because any prosecutions for violation of regulatory laws must be instituted by federal officials, the likelihood of direct interference with federal functions seems slight." (emphasis added).

[12] *See* Act of March 4, 1909, ch. 321, 35 Stat. 1145.

[13] *See* H.R.Rep.No. 959, 72d Cong., 1st Sess.

[14] *Id.* at 1.

> "This is deemed advisable both because there are many Government reservations to which no Federal law is applicable with respect to certain minor offenses (*notably traffic offenses*) - and because, during the 22 years that have elapsed since the passage of the Criminal Code, the pertinent laws of some of the States have been made more stringent, or otherwise amended . . ." (emphasis added). [15]

Although H.R. 10589 passed in the House, it did not receive consideration in the Senate. [16] However, on April 27, 1933, and in support of H.R. 5091 to accomplish the same objectives as H.R. 10589, Congressman Sumners, who had then become Chairman of the House Committee on the Judiciary, presented House Report 56 to the House. [17] Again, Attorney General Mitchell's December 9, 1931 letter was appended to and incorporated into the Committee on the Judiciary report, with H.R. 5091 passing both the House (May 16, 1933) and the Senate (June 10, 1933) and becoming law June 15, 1933. [18]

The significance of these circumstances insofar as the present issues are concerned lies in the apparently plain recognition by both the United States Department of Justice, through Attorney General Mitchell, and the Congress, through H.R.Rep.No. 959, H.R.Rep.No. 56, and H.R. 5091 itself that the assimilative crimes statute was clearly intended by Congress to include within its scope the penal provisions of certain State laws even if those State laws constituted sanctions contained within statutory

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[15] *Id.* at 2. *See also* 77 Cong.Rec. S5530-S5532 (daily ed. June 10, 1933) (Remarks of Senator Black regarding the purpose and effect of the assimilative crimes statute).

[16] The reason for the failure of H.R. 10589 to pass the Senate in 1932 was due only to congestion in the docket of the Senate Committee on the Judiciary. *See* 77 Cong.Rec. S5530 (daily ed. June 10, 1933) (Remarks of Senator Black.)

[17] *See* H.R.Rep.No. 56, 73d Cong., 1st Sess.

[18] *Id.* at 1-2. *See* Act of June 15, 1933, ch. 85, 48 Stat. 152.

schemes which might otherwise be characterized as "civil" or "regulatory" in their general nature. This is the most logical conclusion to be drawn from Attorney General Mitchell's reference to traffic offenses which might arise within the otherwise civil statutory scheme of licensing and regulating the operation of motor vehicles.

In this regard, it has long been settled that the States may, as a civil or regulatory matter, enact reasonable licensing requirements and regulatory measures governing the operation of motor vehicles on the public highways. *See, e.g., Raymond Motor Transport, Inc., v. Rice*, 434 U.S. 429, 443-444 n. 18 (1978); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949); *Hendrick v. Maryland*, 235 U.S. 610 (1915). Clearly, this is a valid and appropriate exercise of the States' regulatory jurisdiction. Thus, Attorney General Mitchell's recognition of the need to provide for the incorporation of State traffic offense laws into the Federal Code, as needed, when coupled with the rationale of the cited cases, provides yet additional support for the conclusion that Congress intended to include within the scope of the Assimilative Crimes Act the penal sanctions of otherwise "civil/regulatory" State systems.

Significantly, this is further confirmed through an examination of the colloquy among Senators Black, Herbert and Johnson concerning the 1933 amendments to the assimilative crimes statute. While the amendments had the primary objective of updating the federal law to bring it current with State laws that had changed since its last preceeding amendment, the discussion clearly discloses an acknowledgement that the penal sanction provisions of State laws otherwise viewed as regulatory in their general nature were then — and were to continue to be — assimilated into the federal law. [19]

Although expressing certain concerns over the philosophical wisdom of adopting State laws into the Federal

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[19] *See* 77 Cong.Rec. S5530-S5532 (daily ed. June 10, 1933).

Code, the discussion plainly reveals a recognition by the legislators, particularly Senator Black of Alabama — who had prepared a report for the Committee on the Judiciary explaining the amendments — that the penal enforcement provisions of otherwise characterized "civil/regulatory" State laws were intended to be assimilated. The gentleman from Alabama was Senator Hugo L. Black, later to become an Associate Justice of the United States Supreme Court. [20]

In addition, although 18 U.S.C. § 13, the Assimilative Crimes Act, does not apply to Indian country within Pub.L.

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[20] *Id.* at S5530. Senator Black stated:

"Mr. President, I desire to submit a report from the Committee on the Judiciary and ask for the immediate consideration of the bill which I shall explain. I am sure there will be no objection from any Member of the Senate when the situation is understood.

"I report back favorably from the Committee on the Judiciary with an amendment [to] the bill (H.R. 5091) to amend section 289 of the Criminal Code and I ask unanimous consent for its immediate consideration.

. . . .

"I can explain very briefly the purport and intent of the bill. There are certain Government reservations throughout the country. There was enacted in 1909 a law which provided that *all of the laws of the State or district in which a reservation was located should be adopted by the Federal Government as laws governing the acts or things committed or done on those reservations*, but it made the date of those laws as in effect in 1909.

"The result is that today a man may do something on a Government reservation which is not a violation of any State law, which is not a violation of any Federal law, but which would have been a violation of the law of that State in 1909. The man who happens to commit that act on a Government reservation could be punished, although the law of the State had been repealed since 1909. Manifestly, there is no reason for such a law. The total effect and the sole effect of the amendment is to provide a change so that the thing done must be a violation of a law of that State in existence [at the time] of the doing of the act.

"I hope I have made the matter clear to Senators." (emphasis added).

280 States,[21] the legislative history of both Pub.L. 280 and 18 U.S.C. § 13 reveals many close conceptual links between the two laws. Thus, while not directly applicable, the historical chronology of this aspect of Pub.L. 280 may be of assistance in analyzing the issue in non-Pub.L. 280 States such as the Amici Curiae States.

In this regard, prior to 1953, when Pub.L. 280 first became law, most of the federal laws which granted the States jurisdiction over reservation Indians confined themselves to criminal jurisdiction, including the predecessor bills to H.R. 1063, which became Pub.L. 280.[22] Moreover, this circumstance has been interpreted as evincing an intention by Congress to merely effectuate "a switch from the federal government enforcing state criminal law under the Assimilative Crimes Act to the states enforcing their own laws."[23] Thus, the exclusion in 18 U.S.C. § 1162(c) seems clearly to be in recognition of the jurisdiction of Pub.L. 280 States to enforce within Indian country the same types of laws contemplated under 18 U.S.C. § 13, *viz.*, purely prohibitory criminal laws as well as penal sanctions serving as enforcement measures in civil/regulatory schemes.

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[21] *See* 18 U.S.C. § 1162(c). It must also be noted that, whether in a Pub.L. 280 State or a non-Pub.L. 280 State, offenses committed in Indian country therein by non-Indians either against other non-Indians or non-tribal members, and including "victimless" offenses, remain subject to State laws independently of the provisions of either Pub.L. 280 or 18 U.S.C. § 13. *United States v. Antelope*, 430 U.S. 641, 643 n. 2 (1977); *New York, ex rel. Ray v. Martin*, 326 U.S. 496 (1946). *Cf. State of Arizona v. Herber*, 123 Ariz. 214, 598 P.2d 1033 (App. 1979), wherein the United States Department of Justice filed an amicus curiae brief in support of Arizona's jurisdiction over a non-Indian arrested and prosecuted for possession of marijuana in Indian country.

[22] *See* Goldberg, PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS, 22 U.C.L.A.L.Rev. 535, 544 n. 45 (1975). It should be noted that Professor Goldberg-Ambrose is on the Board of Authors and Editors of the 1982 revised edition of F. Cohen, *Handbook of Federal Indian Law* (1982), a recognized treatise in the area of Indian law; *cf. Bryan, supra*, 426 U.S. at 379, 388 n. 13.

[23] *Id.*

Accordingly, the reliance in the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, upon the *Marcyes* discussion, in turn, of the dictum in this Court's footnote 8 in *Johnson*, *supra*, further demonstrates the weakness of the "civil/regulatory - criminal/prohibitory" dichotomy. Furthermore, the distinction cannot be legitimized by reliance upon notions of tribal self-government: it must be remembered that the sole raison d'etre for Indian country gambling operations lies in the enticement of a virtually exclusive non-Indian playing clientele to venture onto Indian reservations to participate in acts within Indian country *because* they are prohibited beyond Indian country. This should not be the federal policy toward this topic. [24]

There exists, however, additional evidence that the rationale of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, is in error. The basis for that error lies in an examination of this Court's decision in *Bryan*, *supra*. There, this Court held that Pub.L. 280 was not intended by Congress to constitute a grant to the State of Minnesota of civil taxation jurisdiction over tribal member Indians on their reservations. [25]

To begin with, in *Bryan*, *supra*, this Court was faced with the question of whether or not Minnesota's substantive civil tax laws — as opposed to civil procedural laws governing private causes of action in state court — were applicable to a tribal member Indian in Indian country within Minnesota. In rejecting such applicability, this Court turned to the

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[24] The federal policy toward strong law enforcement by the States and the Federal Government with regard to gambling activities is evident. *See, e.g.*, Report to the President and the Attorney General of the President's Commission on Organized Crime, *The Impact: Organized Crime Today*, Vol.I, pp.11-12; Vol. III, § 3.3.2, pp.28-33 (April, 1986).

[25] A contrary result had been reached by the United States District Court for the District of Nebraska and the United States Court of Appeals for the Eighth Circuit. *See Bryan*, *supra*, 426 U.S. at 378 n. 3; *Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421 (D. Nebr. 1974), *affirmed* 516 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976)."

legislative history of Pub.L. 280. After acknowledging that the central focus of Pub.L. 280 was concern by Congress for the enforcement of state criminal laws in Indian country, this Court found that the grant of civil jurisdiction to the States was limited to those civil laws relating to private rights and status and the concomitant jurisdiction of the State courts to adjudicate such rights and status when Indians were involved. *Bryan*, *supra*, 426 U.S. at 379-387.

In particular, this conclusion was emphasized by the Court's observation that the "consistent and exclusive . . ." use of terms deemed to establish that Congress had not intended to subject Indians to the direct application of state substantive civil laws rendered Minnesota's attempt to impose its tax laws upon Indians in Indian country ineffectual. *Bryan*, *supra*, 426 U.S. at 385.

In reaching this result, this Court acknowledged, however, that a congressional report, H.R.Rep.No. 848, recognized that the Indians of several States had reached a stage of acculturation and development that made desirable the extension of State civil jurisdiction to the Indian country. [26] However, this Court rejected the effect of that congressional finding upon the grounds that it was an "unelaborated statement . . ." the thrust of which was too difficult to reconcile with the focus of Pub.L. 280. [27]

A closer examination of H.R.Rep.No. 848 (which was in turn incorporated into S.Rep.No. 699 on the same bill, H.R. 1063) discloses that an additional portion of the language of S.Rep.No. 699 being quoted was omitted by ellipsis in the

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[26] H.R.Rep.No. 848, presented on July 16, 1953, accompanied H.R. 1063, which eventually became Pub.L. 280. A virtually identical Senate report, S.Rep.No. 699, presented on July 29, 1953, adopted and incorporated H.R.Rep.No. 848 in support of H.R. 1063. *See* U.S. Code Cong. & Admin. News 1953, p. 2409.

[27] In support of this finding, this Court cited with apparent approval the discussion of the issue in the Goldberg law review article, *supra*, 22 U.C.L.A.L.Rev. at 543. *See Bryan*, *supra*, 426 U.S. at 388 n. 13.

law review article.[28] The language of H.R.Rep.No. 848 and S.Rep.No. 699 which was omitted from the law review article strongly indicates an elaboration by Congress upon the question of the applicability of substantive State penal enforcement laws in Pub.L. 280 States.[29]

In fairness, however, it must be noted that, in subsequent footnote 188 in the law review article, the "substantive civil laws" language of the foregoing quote is included and discussed in connection with a further examination of the question of whether Pub.L. 280 jurisdiction was intended by Congress to be limited to civil "causes of action." The text of the law review article to which footnote 188 relates concluded that that portion of Sec. 4 of Pub.L. 280, dealing with the grant of civil jurisdiction to the States, appeared to preclude the argument that Pub.L. 280 was merely an authorization for State courts to serve process on tribal member Indians for such causes of action as tort law and contract law as may arise on the reservations, with

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[28] *See* 22 U.C.L.A.L.Rev. at 543.

[29] *See* S.Rep.No. 699, at 5-6 and H.R.Rep.No. 848, at 6, both reprinted in U.S. Code Cong. & Admin. News 1953, p. 2412. The complete paragraph in question reads as follows:

"Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, *and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.*" (emphasis added).

regulatory and licensing jurisdiction to be confined to the tribes themselves." [30]

These circumstances seem clearly to support the position of the State of California herein. After tracing various of the indicia of congressional intent with regard to the scope of civil jurisdiction under Pub.L. 280, including the remarks of Sen. Sam Ervin regarding the 1968 amendments to the law, [31] Professor Goldberg concluded that "this legislative history fails to define the extent of civil jurisdiction under Pub.L. 280." *See* 22 U.C.L.A.L.Rev. at 577. The author also examines the question of whether civil "public" actions such as the licensing of professionals and regulation of land use, which are "usually backed up by the threat of criminal or civil enforcement" by the States, were intended to be included within the scope of Pub.L. 280. Id. at 578.

In yet another footnote, Professor Goldberg then opines that State regulation of on-reservation activity in Pub.L. 280 States would appear to be appropriate and consistent with

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[30] 22 U.C.L.A.L.Rev. at 576 n. 188 then concludes:

"The statement in the Senate Report noting that PL-280 permits state courts both 'to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States' *seems to confirm this assessment of the law*. S.Rep.No. 699, supra note 23, at 5. *The counsel for the B.I.A. at the hearings on PL-280 also supported this interpretation* when he stated that the law

> 'would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, *so that they will be subject to the same laws and the same rules as the other citizens.*'

Statement of Harry A. Sellery, Jr., Chief Counsel, B.I.A., June 29, 1953, in Hearings Transcript I, supra note 22, at 5. Furthermore, the language of Pub.L. 280 excepting from state jurisdiction the power to encumber trust property or regulate it in a manner inconsistent with federal law would seem unnecessary if regulatory jurisdiction had not been conferred at all. 28 U.S.C. § 1360(b) (1970) (quoted in note 157 supra)." (emphasis added).

[31] *Cf. Bryan, supra*, 426 U.S. at 387.

the intent of Congress where the activity, although generally of a "civil" nature, is subject to criminal sanctions, notwithstanding any conceptual distinction sought to be drawn between sanctions imposed under "regulatory" schemes or under "prohibitory" schemes. [32]

While the foregoing seems plainly adequate to establish that the "civil/regulatory - criminal/prohibitory" dichotomy as fashioned and applied by the lower court herein is lacking in both a firm conceptual or historical basis, one final point of confirmation should be noted regarding the position of the United States Department of Interior on H.R. 1063, which became Pub.L. 280.

As pointed out by the State of California in its opening brief, on June 26, 1953, prior to the presentation of either H.R.Rep.No. 848 or S.Rep.No. 699, Mr. Orme Lewis, Assistant Secretary of the Department of the Interior, transmitted a report to Congressman A.L. Miller outlining certain changes and clarifications regarding H.R. 1063 deemed necessary by the Department of Interior. The report had been requested by Congressman Miller as Chairman of the House Committee on Interior and Insular Affairs, which committee has as one of its major functions the responsibility of overseeing matters involving Indian affairs. The report, in the form of a letter, acknowledged that as to the question of the scope of civil jurisdiction under H.R. 1063, the intent of the law was to bestow jurisdiction upon the States

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[32] *See* 22 U.C.L.A.L.Rev. at 578 n. 198. The author further notes that the problem is generally avoided in non-Pub.L. 280 States, since State criminal laws may be enforced pursuant to 18 U.S.C. § 13, the Assimilative Crimes Act, and concludes, *inter alia*, that the language in Pub.L. 280 normally seized upon by Indians as demonstrating a congressional intent to limit state jurisdiction to civil causes of action alone was

> "the product of ambiguous drafting, and not of fundamental policy choices. *It is most likely that criminal and civil jurisdiction were designed to be coextensive, and similarly regulatory in nature.*" (emphasis added). 22 U.C.L.A.L.Rev. at 580.

> "not *merely* to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but *also to extend to those reservations the substantive civil laws of the State insofar as those laws are of general application to private persons or private property.* The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians *insofar as these customs or ordinances are not inconsistent with the applicable State laws.* By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs." (Emphasis added.)

The full text of the letter is included in the Joint Appendix herein. Since the document is not generally available, a copy is included in the appendix of the Brief of the Amici Curiae States, *infra*, for the convenience of the Court and counsel.

In view of this report to Chairman Miller from Mr. Lewis, as the then-serving Assistant Secretary of Interior, there would appear to be significant and fundamental inconsistencies between the legislative history of Pub.L. 280 and the conclusions reached by the lower court decision herein regarding the applicability of this Court's decision in *Bryan, supra*, to the issue of Indian country gambling operations. Moreover, even if Mr. Lewis' report were interpreted as not being inconsistent insofar as the taxation issues under consideration in *Bryan, supra*, were concerned, it would still be manifestly illogical and unwarranted to interpret the report as supporting the "civil/regularory - criminal/prohibitory" dichotomy adopted by the lower court herein.

Accordingly, the complicated history of Pub.L. 280 and the Assimilative Crimes Act as summarized herein is intended to demonstrate but one point, *viz.*, that whether viewed from the perspective of a Pub.L. 280 State or from that of a non-Pub.L. 280 State, such as the Amici Curiae States, the decision of the Ninth Circuit Court of Appeals in

the *Cabazon* case, *supra*, can be viewed as accomplishing nothing but a result. The holding is based upon erroneous assumptions, incomplete analyses, and dictum from judicial decisions having little if any relevance to the central issues concerning gambling within Indian country.

For all the foregoing reasons, insofar as the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, rely upon this Court's decision in *Bryan*, *supra*, the reliance is clearly misplaced. While the rationale of *Bryan*, *supra*, may be applied to questions involving the propriety of Pub.L. 280 States' attempts to subject tribal member Indians to State taxes, the attempt to transpose its "civil/regulatory - criminal/prohibitory" analysis onto questions of Pub.L. 280 jurisdiction over Indian country gambling activities — particularly in light of the legislative history of both Pub.L. 280 and 18 U.S.C. § 13 — seems clearly to be strained and without persuasive logic.

In this regard, the rationale of this Court's ruling in *Rice*, *supra*, delineates the more enlightened and appropriate approach to a solution of the difficult questions presented by Indian country gaming activities.

IV

Any Ruling On The Merits In This Case Should Be Narrowly Drawn

In the event that, notwithstanding the foregoing arguments, this Court ultimately affirms the lower court decision, it is the position of the Amici Curiae States that any opinion issued should be narrowly drawn. This request is made in order to preserve the rights of the Amici Curiae States to enforce their otherwise applicable laws regarding gambling activities in Indian country as to such activities *other* than those directly under consideration in the State of California.

In this regard, certain of the Amici Curiae States, as noted in the Statement of the Interest of the Amici Curiae, *supra*, are presently confronted with actual or proposed Indian country gambling operations involving types and modes of

gaming which are, in the view of the Amici Curiae, prohibited as a matter of both Federal and State law both within and beyond Indian country in the said States. Stated otherwise, the type and/or mode of gambling activity is not "regulated" beyond Indian country at all, but is uniformly prohibited throughout the States.

For example, the Amici Curiae State of Arizona is presently involved in litigation calling into question whether a parimutual jai alai fronton may be built and operated within Indian country just south of the Phoenix metropolitan area. *See Gila River Indian Community v. Corbin*, No. CIV 85-1032 PHX EHC (D.Ariz. filed April 12, 1985); *C.A.H.K., Inc., et al., v. Corbin*, No. CIV 85-1037 PHX EHC (D.Ariz. filed April 15, 1985) (consolidated). It is the position of the Amici Curiae State of Arizona that, regardless of the outcome of the present case, it should have the opportunity to litigate the separate legal questions presented in the foregoing disputes from the perspective of a non-Pub.L. 280 State.

While the Amici Curiae States, representing jurisdictions where Pub.L. 280 is not generally in effect, support the position of the State of California, it remains their position that even if the lower court decision be affirmed, the historical, factual and legal specifics which exist their respective jurisdictions provide various bases upon which the situation in California may be distinguished.

CONCLUSION

This Court has recently confirmed that, foremost among the prerogatives of the sovereignty of the *States* is the "power to *create and enforce* a criminal code." (emphasis added). *Heath v. Alabama*, _____U.S. _____, 106 S.Ct. 433, 440 (1986). In essence this articulates an attribute of *State* self-government which, under the rationale of *Rice, supra*, should be accorded deference and balanced against the competing interests of the Federal and Tribal governments. *See also, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, _____ U.S. _____ (July 1,

1986; 46 CCH S.Ct. Bull.P. B4135). There, this Court opined — in response to the Puerto Rico Legislature's concern that advertising of casino gambling aimed at Puerto Rican citizens posed the threat of, among other evils, the development of corruption and the infiltration of organized crime — that a legislature's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Posadas*, *supra*, 46 CCH S.Ct.Bull. at B4149.

The Amici Curiae States would respectfully submit that the States' legitimate law enforcement concerns vis-a-vis Indian country gambling operations fall clearly within the same rationale acknowledged in *Posadas*, *supra*. Accordingly, and for all of the foregoing reasons, the result must be the reversal of the United States Court of Appeals for the Ninth Circuit decision herein.

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(August, 1986)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D.C.

June 26, 1953

My dear Mr. Miller:

This will refer to your request for a report on H.R. 1063, a bill "To amend title 18, United States Code, entitled 'Crimes and Criminal Procedure', with respect to State jurisdiction over offenses committed by or against Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State".

I recommend that this bill be enacted if its title and text are amended to conform to the enclosed draft.

The bill would extend the criminal laws of the State of California to all the Indian country within that State. Concurrently, it would withdraw the entire State from the operation of the Federal Indian liquor laws. Finally, it would permit the courts of the State of California to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property is involved.

Approximately 30,000 Indians live in the State of California. They are divided into many different groups, widely dispersed throughout the State. Their lands include a large number of small rancherias and allotments, which are also widely scattered. The State lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in title 18, United States Code, section 1151, except in the case of the Agua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was conferred by the Act of October 5, 1949 (63 Stat. 705.)

The applicability of Federal criminal laws is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against In-

dians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of title 18, United States Code. As a practical matter, the enforcement of law and order among Indians in the Indian country has been left largely to the Indian groups themselves, and in California they are not adequately organized to perform that function. The Indians of the Hoopa Valley Reservation and the Yuma Reservation have a form of tribal law enforcement, but none of the other reservations in the State has any means of preserving law and order. Consequently, there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State. The Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State. This has already been accomplished on the Agua Caliente Indian Reservation by the Act of October 5, 1949 (63 Stat. 705). A likely policy should be applied to the rest of the State. In doing so due regard should be given, of course, to the safeguarding of the rights guaranteed the Indians by Federal treaties, agreements, and statutes.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H.R. 1063. No opposition to the enactment of the proposed legislation was voiced by any of the Indian groups. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State, Representatives of other groups have also indicated their approval.

Proposed legislation similar to H.R. 1063 has been discussed with the Governor of California and he has indicated his approval of the objective of the proposal. The Legislature of California, by Senate Joint Resolution No. 29, has recently memorialized the Congress to enact H.R. 1063.

The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as these laws are of general application to private persons or private property. The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs or ordinances are not inconsistent with the applicable State laws. By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs.

The enclosed draft is designed to perfect H.R. 1063 in a manner consistent with its basic intent. The only major substantive difference is the omission of the provisions that would have excluded the entire State from the Operation of the Federal Indian liquor laws. There is no doubt that the Indians of California are as prepared to be subjected to the other laws of the State. However, general legislation to repeal, in whole or in part, the Indian liquor laws is now before the Congress, and it seems preferable to deal with the subject in that manner rather than in a bill, such as H.R. 1063, having a different primary objective.

In large measure the criminal jurisdiction provisions of the enclosed draft are identical with those of H.R. 1063. The subsection that would have reserved to the Federal courts concurrent jurisdiction over offenses by or against Indians has been omitted as its effect would be to make persons in the Indian country subject to two different, and possibly conflicting, systems of law. For like reasons, a subsection has been added that would render inapplicable in California the Federal criminal laws which apply to offenses committed by or against Indians within the Indian country. Finally, the subsection relating to the protection of trust or restricted Indian property and of Indian fishing and hunting rights

has been revised in an effort to make its provisions as precise and certain as possible.

The provisions of the enclosed draft relating to civil jurisdiction are based on those of H.R. 1063, but have been recast in a form that would permit them to be incorporated in the general body of the judicial laws as now codified in title 28 of the United States Code. These provisions are designed to give the State of California jurisdiction over civil controversies and transactions involving Indians to the fullest extent consistent with the discharge of Federal responsibility for the protection of trust or restricted property. The State and its courts could not take any action that would affect the status of this property in any way or that would improperly deprive the Indians of any of the benefits therefrom. However, once the trust or restriction was terminated by the United States, the jurisdiction of the State and its courts would automatically attach.

Both H.R. 1063 and the enclosed draft would repeal section 1 of the Act of October 5, 1949 (63 Stat. 705), which conferred on the State of California civil and criminal jurisdiction over the land and residents of the Aqua Caliente Indian Reservation. The enactment of H.R. 1063, applicable to the entire State, should be accompanied by the repeal of section 1 of this Act in order to make the same civil and criminal jurisdictional statute applicable to all Indian country within the State.

Since I am informed that there is a particularly urgency for the submission of the views of the Department, this report has not been cleared through the Bureau of the Budget and, therefore, no commitment can be made

concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

Orme Lewis
Assistant Secretary of the
Interior

Hon. A. L. Miller, Chairman
Committee on Interior and Insular Affairs
House of Representatives
Washington 25, D. C.
Enclosure

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No. 85-1708

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MINNESOTA IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Minnesota, like many states, has a significant amount of Indian country within its borders. Eleven major reservations, comprising approximately 2.5 million acres of land and water, are found in the state. On most of these reservations, Indian bands operate gaming facilities which violate state law. Although bingo games and pull-tabs are the predominant methods of gambling within reservations, there are an in-

creasing number of questions arising concerning other forms of gambling. These other forms include betting on video-display gambling games, pari-mutuel betting on televised horse or other types of racing, and the playing of casino-variations of bingo such as "bingo-jack" or "bingo-roulette."

As long as the rules governing the jurisdiction over gambling in Indian country remain in their confused state, Minnesota will face an ever-increasing number of attempts to create large gambling havens on Indian land within its borders. An increased level of litigation is inevitable. Potential spill-over effects of large unregulated gambling operations to non-reservation territory are obvious. The concern over these problems is one reason for the filing of this *amicus* brief.

There is another reason, however, which leads Minnesota to approach the Court with a separate *amicus* brief challenging the ruling of the Ninth Circuit Court of Appeals in the *Cabazon* case. The *Cabazon* court reaffirmed the "civil-regulatory/criminal-prohibitory" analysis of Public Law 83-280 (18 U.S.C. § 1162 and 28 U.S.C. § 1360) (hereafter "Public Law 280") that was espoused in the earlier cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); and *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981). This analysis is unjustified, inappropriate, and has pernicious effects which go far beyond the field of Indian gambling. The analysis has already been used in Minnesota in an attempt (ultimately rejected by the state supreme court) to challenge the applicability of the state's gun use laws in Indian country, and is readily available to cast confusion over

much of the state's authority to enforce traditionally "criminal" laws in Indian country. Carried to its logical conclusion, the civil-regulatory/criminal-prohibitory distinction could remove much of the criminal jurisdiction Congress thought it was granting the states when it passed Public Law 280.

The *Cabazon* court's use of the civil-regulatory/criminal-prohibitory framework cannot be allowed to stand without severe scrutiny. The Court now has an opportunity to re-examine that analysis, to re-examine some of its own *dicta* in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and to straighten out the extreme interpretations given by some lower courts to its comments about Public Law 280 in the *Bryan* case.

Because of Minnesota's concern about the future effects of the *Cabazon* court's analysis of Public Law 280, this *amicus* brief will focus almost entirely on that aspect of the current appeal.

SUMMARY OF ARGUMENT

The *Cabazon* court rejected the argument that Public Law 280's grant of criminal jurisdiction (18 U.S.C. § 1162) gave California the authority to apply its bingo statutes to Indians in Indian country. In so doing, it adopted the so-called "civil-regulatory/criminal-prohibitory" test for interpreting Public Law 280. This test was most clearly articulated and applied to state bingo laws in *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) and was subsequently followed in the cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981).

Minnesota urges this Court to reject the civil-regulatory/criminal-prohibitory test as set forth in *Butterworth* and adopted in *Cabazon*. The test should be rejected for three reasons.

First, the test is not grounded on an analysis of the wording or history of Public Law 280, and is not based on well-reasoned precedent. The *Butterworth* court did not engage in an independent analysis of Public Law 280, but merely borrowed the civil-regulatory/criminal-prohibitory language from an earlier case which interpreted, not Public Law 280, but the Assimilative Crimes Act. That earlier case was *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). However, the *Marcyes* court had not created the test as a clear rule of law. In fact, the court initially rejected the test. It only used the civil-regulatory/criminal-prohibitory distinction for the sake of argument, deciding that even if the test were used, it did not help out the defendant in the case. *Butterworth* accepted the validity of the test without much question, apparently because the litigants argued the case to the court in that fashion. Neither *Butterworth* nor its successors seriously re-examined *Marcyes* or the foundation of the test.

The second reason for rejecting the test is that it violates long-held principles concerning the primary power of states to define what crimes and offenses are. *Rochin v. California*, 342 U.S. 165 (1952); *Knights of Pythias v. Meyer*, 265 U.S. 30 (1924). When it passed the criminal portion of Public Law 280, Congress knew that "offenses" and "crimes" were within the domain of states to define. Congress did not limit its grant of jurisdiction to "prohibitory" statutes; it allowed state jurisdiction over all crimes and offenses as the states define them. The *Cabazon* court improperly engrafted additional limitations to Public Law 280 which Congress did not express or imply.

The final reasons for rejecting the civil-regulatory/criminal-prohibitory test are that it is simplistic, unworkable, and overly susceptible to semantic ambiguities. Its use could turn many traditionally criminal statutes into civil-regulatory ones. There is no predictability to its use. Its adoption will cause substantial confusion and litigation.

Because of the legal and practical problems of the civil-regulatory/criminal-prohibitory test, this Court should adopt a new method for interpreting the grant of criminal jurisdiction in Public Law 280. The new method should consider the existence of criminal penalties for statutory violations, the state's own characterizations of its statutes, the location of the statute in the state laws, and appropriate declarations of the state legislature. The new test would implement congressional policy and preserve traditional principles of federalism. If a new test is adopted, *Cabazon* should be remanded for further analysis in light of this Court's holding.

ARGUMENT

I. THE CIVIL-REGULATORY/CRIMINAL-PROHIBITORY ANALYSIS OF *BUTTERWORTH* AND SUCCEEDING CASES IS NOT GROUNDED ON FIRM LEGAL FOUNDATIONS, VIOLATES LONG-HELD PRINCIPLES OF FEDERALISM, AND IS NOT WORKABLE.

The first section of the *Cabazon* opinion deals with the question of whether the criminal portion of Public Law 280 (18 U.S.C. § 1162) gave states jurisdiction over Indian-run bingo operations in Indian country. Citing the cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) and *Seminole Tribe v. Butterworth*, 658 F.2d (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), the court concluded that Public Law 280's grant of criminal jurisdiction to California did not reach bingo operations. 783 F.2d at 901-903.

The conclusion of the *Cabazon* court was based on a so-called "civil-regulatory/criminal-prohibitory" test. Under that test, a law cannot be enforced by a state as a criminal law unless it completely prohibits a certain kind of conduct in its entirety. If a state law allows a certain activity—even though the activity may be strictly limited and regulated—the law must be considered to be "civil-regulatory" and falls outside the criminal jurisdiction granted by Public Law 280. The *Cabazon* court's reliance on this kind of test was in error. The civil-regulatory/criminal-prohibitory distinction used by that court must be re-examined and rejected.

A. Background and Summary of the Current Dispute Over Public Law 280.

The Public Law 280 issue raised by the *Cabazon* holding has its origins in some comments by this Court in the case of *Bryan v. Itasca County*, 426 U.S. 373 (1976). As the Court knows, Public Law 280 granted certain types of jurisdiction over Indians in Indian country to specified states. The grant of civil jurisdiction was codified in 28 U.S.C. § 1360; the grant of criminal jurisdiction was codified in 18 U.S.C. § 1162. The grant of criminal jurisdiction in 18 U.S.C. § 1162 is of primary importance in the current gambling disputes. That section reads in relevant part as follows:

> (a) Each of the States or Territories listed in the following table *shall have jurisdiction over offenses committed by or against Indians* in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, *and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:* . . . .

(Emphasis added.) In Public Law 280 jurisdictions, the initial inquiry in cases such as *Cabazon* usually is whether this grant of criminal jurisdiction allows the states to apply their bingo or other gambling laws to Indians.

Indian bands argue, and the *Cabazon* court agreed, that Public Law 280 criminal jurisdiction does not authorize enforcement of California bingo laws because those laws are "civil-regulatory" and not "criminal-prohibitory." This inter-

pretation of the criminal jurisdiction portion of Public Law 280 arises out of wording that appears in the Court's 1976 opinion in *Bryan v. Itasca County*, 426 U.S. 373 (1976). *Bryan* was a tax case that interpreted the *civil jurisdiction* provisions of Public Law 280.[1] Significantly, the case did not involve an interpretation of the grant of criminal jurisdiction contained in 18 U.S.C. § 1162.

The *Bryan* court held that Congress' grant of civil jurisdiction did not give Minnesota the power to tax personal property of Indians in Indian country. The *Bryan* court reasoned 1) that the major concern of Congress in passing Public Law 280 was with law and order problems on reservations;[2] 2) that the civil jurisdiction portion of the law was intended primarily to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians and other private citizens;"[3] 3) that in the legislative history of the bill, there was an absence of any reference to taxing authority;[4] and 4) that the civil portion of Public Law 280 was not intended to extend to Indians the "entire array of state non-criminal laws" such as the power to tax.[5] Without

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[1] The grant of civil jurisdiction, codified in 28 U.S.C. § 1360, reads in relevant part as follows:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: . . . .

[2] 426 U.S. at 379-80.

[3] *Id.* at 383.

[4] *Id.* at 381.

[5] *Id.* at 384.

defining precisely what it meant by the phrase, the *Bryan* court opined that the civil section of Public Law 280 did not confer "general state civil regulatory control over Indian reservations."[6]

The ambiguities surrounding the *Bryan* wording soon escalated. In brief summary, a ninth circuit case (*United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977)) borrowed some of the *Bryan* language about Public Law 280 civil jurisdiction, and allowed it to be applied to a different federal criminal statute, the Assimilative Crimes Act (18 U.S.C. §§ 13 and 1152). Then the fifth circuit borrowed wording from the *Marcyes* opinion and allowed the *Marcyes* extrapolation of *Bryan* to be used to interpret the criminal portions of Public Law 280. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). The ninth circuit then adopted the *Butterworth* holding and applied it to California. *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

The result of the above cases is substantial confusion over what is meant by the term "criminal jurisdiction" as granted by Public Law 280, and what is meant by *Bryan's* reference to "general civil regulatory laws" such as the tax laws addressed in that opinion. As will be discussed in detail *infra*, Minnesota suggests that the process leading up to the *Cabazon* ruling was a haphazard one, and that the actual wording and intent of the criminal portion of Public Law 280 (18 U.S.C. § 1162) has been ignored.

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[6] *Id.*

B. The *Butterworth* Test Was Developed Without Adequate Analysis or Consideration.

The *Butterworth* case from the fifth circuit was the first federal case that analyzed Public Law 280 in terms of a distinction between state "criminal-prohibitory" laws and "civil-regulatory" laws. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). It was cited (without much re-examination) as the basis for the holding of succeeding federal cases such as *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981); *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and of course, *Cabazon*. Before this Court simply accepts the *Butterworth* distinctions, it should examine that case closely to see where they came from. Minnesota submits that the *Butterworth* test came about more by accident than design, and that it is not supported by the history of Public Law 280 or relevant long-standing Supreme Court precedent.

Although first applied to Public Law 280 in *Butterworth*, the civil-regulatory/criminal-prohibitory analysis did not originate with that case. Rather, both the district court and the court of appeals borrowed the distinction that was made between "civil" and "criminal" by the Court of Appeals for the Ninth Circuit in a case entitled *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977).

Marcyes was an Assimilative Crimes Act (18 U.S.C. § 13 and § 1152) case which dealt with the question of whether the State of Washington's fireworks control law could be enforced by the United States against Indians in Indian country. The court had to decide whether the state fireworks law was a criminal offense that could be prosecuted under the Assimilative Crimes Act. *Marcyes* held that the Washington

fireworks law was generally "prohibitory" in nature and considered it to be criminal:

> We conclude that Washington's fireworks law is a prohibitory rather than regulatory law. Even though the Washington scheme allows for limited exceptions, . . . its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law.

557 F.2d at 1364. The *Butterworth* court seized on the "prohibitory" discussion of *Marcyes* and applied it to the criminal part of Public Law 280 and, ultimately, to bingo laws.[7] Succeeding cases relied on *Butterworth*.

Although the civil-regulatory/criminal-prohibitory analysis seems to be accepted today without question by many courts, it is certainly not deeply ingrained in the law. Its birth, as discussed, was in *Marcyes* in 1977. However, even its use in *Marcyes* may have been more accidental than intentional. In

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[7] One thing the *Butterworth* court did not do, however, was pay much attention to the *Marcyes* discussion of what characterized regulatory laws as distinguished from prohibitory laws allowing exceptions. *Marcyes* concluded that a main characteristic of regulatory laws (distinguishing them from prohibitory ones) was a revenue-raising purpose. Hunting license statutes were used as an example:

> The purpose of such [hunting and fishing license] statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens.

557 F.2d at 1364. The courts that have considered bingo statutes have, without much comment, carried the analysis to much more extreme version: that a law which allows *any* activity must be considered a regulatory one.

that case it appears that the appellants, not the court, were most concerned about categorizing laws as "prohibitory."

> Their [appellants'] chief argument is that the ACA [Assimilative Crimes Act] only incorporates the general criminal code or prohibitory laws of a state and cannot be utilized to enforce the penal provisions of state regulatory laws such as Washington's fireworks laws.

557 F.2d at 1364. Then, in a conclusion the *Butterworth* court pointedly overlooked, *Marcyes* held that:

> A literal reading of the statute ("any act or omission") *would seem to indicate that the appellants' regulatory/prohibitory distinction is unavailing.*

557 F.2d at 1364 (emphasis added). The court further noted that "the extent and scope of the appellants' argument is misdirected." 557 F.2d at 1364.

At that point the *Marcyes* court did something which unfortunately haunts us to this day. *After rejecting its persuasiveness, the court accepted for the sake of argument* the appellants' use of the regulatory/prohibitory terminology. The court concluded that even if it used the appellants' proposed distinction, the case would still be decided against them:

> *Moreover, whatever persuasiveness appellants' argument may have is lost if the Washington statutory scheme is considered prohibitory rather than regulatory.* We conclude that Washington's fireworks law is a prohibitory rather than regulatory law. Even though the Washington scheme allows for limited exceptions . . . its intent is to prohibit the general possession and/or sale of dangerous fireworks *and is not primarily a licensing law.*

557 F.2d at 1364 (emphasis added). The court in *Marcyes* did not propose, advocate, or endorse the appellants' civil-regula-

tory/criminal-prohibitory analysis. It merely concluded that Washington's statute was criminal even under the appellants' own arguments.

In *Butterworth*, the Court of Appeals for the Fifth Circuit accepted the civil-regulatory/criminal-prohibitory language found in *Marcyes* without much comment or re-examination. That could be for either of two reasons. First, the court could have misread *Marcyes* and thought that the case was in fact setting forth a new rule as to what "criminal jurisdiction" entailed. The other, and perhaps more likely, possibility is simply that the parties to the *Butterworth* case presented the case to the court of appeals using that distinction:

> *All parties agree that the case turns on the determination of whether Florida Statute Section 849.093*—which permits bingo games to be played by certain qualified organizations subject to restrictions by the state—*is civil/regulatory or criminal/prohibitory in nature.*

658 F.2d at 311 (emphasis added). A review of the briefs submitted to the court of appeals in *Butterworth* will confirm that the bingo issue was presented to the court by the parties in terms of the civil-regulatory/criminal-prohibitory language.

Since the case was argued to the *Butterworth* court in that fashion, the court analyzed it that way without much further independent analysis. Certainly the cases referred to in *Butterworth* opinion had not established the civil-regulatory/criminal-prohibitory terminology as a significant part of the law.[8] Thus, the civil-regulatory/criminal-prohibitory rule for

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[8] *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) did not even use the terms. The *Santa Rosa* case concerned the civil portion of Public Law 280 as it related to county zoning ordinances. The court held that such zoning ordinances

which *Butterworth* is cited by the Ninth Circuit Court of Appeals in *Barona* and *Cabazon* is not a well-considered long-standing rule at all. It had its basis in the rejected argument of a losing party in the *Marcyes* case, and was given further life by the agreement of two litigants in *Butterworth*. Minnesota urges this Court to recognize the confused and almost haphazard origin of the civil-regulatory/criminal-prohibitory framework. A fresh look should be given the grant of criminal jurisdiction under Public Law 280 as it applies to state laws such as gambling statutes. The civil-regulatory/criminal-prohibitory test should be rejected as unsupported by statutory language, adequate case law, or sound reasoning.

C. The *Butterworth* Test Is Not Grounded on the Wording or History of Public Law 280.

A serious shortcoming of *Butterworth* and succeeding cases is their lack of consideration of the actual wording of 18 U.S.C. § 1162, the statute they were interpreting. The phrase "prohibitory laws" appears nowhere in the statute. The concept of "crimes" being only violations of prohibitory laws appears nowhere in the legislative history of Public Law 280.

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could not be applied in Indian country, not because they were "civil-regulatory" laws, but because they were not civil laws *of the state*, and because such ordinances would encumber trust property in violation of 28 U.S.C. § 1360(b). *United States v. County of Humboldt*, 615 F.2d 1280 (9th Cir. 1980), also d' l not use the civil-regulatory/criminal-prohibitory terminology. The *Humboldt* case involved the same issue as *Santa Rosa*, and the court merely reaffirmed its previous ruling. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), concerns an interpretation of the federal Organized Crime Control Act, and makes reference to "prohibitory" and "regulatory" laws only briefly at the end of its opinion, and only by way of citing *Marcyes*. *United States v. Marcyes*, the other case referred to in *Butterworth*, has already been discussed *supra*.

The plain wording of the statute indicates that all crimes or offenses fall within Public Law 280's grant of jurisdiction, not just violations of "prohibitory" statutes. As section "D", *infra*, discusses, the *Butterworth* rule inappropriately twists what should be a clear and complete grant of authority by the statute.

D. The *Butterworth* Test Violates Long-Held Legal Principles.

Not only is the *Butterworth* test unsupported by statutory language and viable case law, it also runs counter to long-held principles of federalism and statutory interpretation. A fundamental principle underlying this country's division of governmental authority is that the power to define crimes and offenses rests with the states. The only exception to this is when the federal government has defined federal crimes pursuant to its constitutional duties. As the Court held in *Rochin v. California*, 342 U.S. 165, 168 (1952):

> In our federal system the administration of criminal justice is predominantly committed to the care of the States. . . . Broadly speaking, *crimes in the United States are what the laws of the individual States make them*, subject to the limitations of Art. 1 § 10 [1], in the original constitution . . . and of the Thirteenth and Fourteenth Amendments.

(Emphasis added.) A later case expressed this in terms of "the vast domain of the criminal law that belongs exclusively to the States." *Knapp v. Schweitzer*, 357 U.S. 371, 376 (1958).

Within states, the power to define what is a criminal offense rests exclusively with the legislature. Typical of a long

line of cases in Minnesota and elsewhere is the wording of *State v. Bean*, 199 Minn. 16, 20, 270 N.W. 918 (1937):

> It is the exclusive province of the legislature to declare what acts deemed inimical to the public welfare shall constitute a crime, to prohibit the same, and impose appropriate punishment for a violation thereof. Judicial consideration of such enactments is limited to the inquiry whether the constitutional rights of the citizens are thereby violated or impaired.

When the issue of the construction of state statutes is raised in federal court, the federal judiciary should be bound by the construction given the statute by the highest *state* court:

> Under the settled rule of the court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein.

Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924). *Accord Kingsley Corp. v. Regents of U. of N.Y.*, 360 U.S. 684, 688 (1959); *Beauharnais v. Illinois*, 343 U.S. 250, 253-54 (1952).

The above principles have long been recognized by both federal and state courts. They were a fundamental part of the law when Congress passed Public Law 280 in 1953.

Public Law 280 gave certain states such as Minnesota and California "jurisdiction over offenses" in Indian country and made "the criminal laws of such State" applicable in Indian country. In states such as Minnesota there is no difference among the terms "offense," "crime," and "criminal offense"—they are used interchangeably. *State v. Ketterer*, 248 Minn. 173, 79 N.W.2d 136 (1956). "Offenses" include any breach of law established for the general protection of the public

for which punishment by imprisonment may be imposed in a judicial proceeding. *Id.*; Minn. Stat. § 609.02, subd. 1 (1984).

Neither the wording of Public Law 280 nor its legislative history give any indication that Congress meant to alter or limit the fundamental and traditional power of states to define for themselves what crimes and offenses are. Neither the wording of Public Law 280 nor its legislative history make any mention whatsoever that only state "prohibitory" laws constitute the offenses referred to in the federal statute. Public Law 280 contains no indication that Congress—in the face of the traditional power of states to define crimes—was defining a special class of offenses which states would be limited to enforcing. Instead, Public Law 280 was "a general pronouncement that certain federal barriers to state jurisdiction have been eliminated." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, —— U.S. ——, 54 U.S.L.W. 4654, 4659 (U.S. June 17, 1986). It must be concluded that Congress allowed the states to enforce what the *states*, not Congress or the federal courts, define as criminal laws under state statutory schemes.

The circuit courts in *Butterworth*, *Barona*, and *Cabazon* ignored the traditional power of states to define crimes as well as the plain wording of Public Law 280. The courts' focus on the "criminal-prohibitory" category of law has no basis in Supreme Court precedent or in congressional enactment. The courts, on their own, engrafted major and far-reaching amendments onto 18 U.S.C. § 1162—something which even the canons of construction do not allow them to do.

In sum, the civil-regulatory/criminal-prohibitory test not only lacks reasoned court precedent, but it also violates long-standing precedent concerning basic principles of federalism

and statutory construction. When combined with the severe problems inherent in applying the test to specific situations (discussed in section "E" *infra*), ample reason exists to reject the test as an aid to interpreting Public Law 280.

E. The Practical Problems of Applying the *Butterworth* Test Make It An Unacceptable Rule.

The *Butterworth* approach to Public Law 280, as has been discussed, is not mandated by the wording of the statute and in fact violates relevant court precedent. Beyond that, the test is plagued with severe practical problems with regard to its application to varying fact situations.

The civil-regulatory/criminal-prohibitory test adopted by *Cabazon* is unacceptable because it is overly simplistic, too mechanical, and unnecessarily dependent upon semantics. For example, it is possible, depending on how one phrases the issue, to make many traditionally criminal laws fit into the "regulatory" category rather than the "criminal-prohibitory" one. Minnesota's narcotics laws could be considered to be civil-regulatory because narcotics are allowed to be possessed and sold under certain regulated circumstances or with certain licenses. Minn. Stat. ch. 152 (1984). Similarly, machine guns and other dangerous weapons may be possessed under certain circumstances (Minn. Stat. §§ 609.66-.67 (1984)); sexually provocative material may be possessed and disseminated under certain circumstances (Minn. Stat. §§ 617.291-.296 (1984)); fireworks may be possessed and sold under certain circumstances (Minn. Stat. §§ 624.20-.25 (1984)); and even the taking of human life is not "prohibited" under all circumstances (Minn. Stat. §§ 609.06-.065 (1984)).

Already, Minnesota has faced in the state supreme court a challenge to its handgun control laws based on the use of the

civil-regulatory/criminal-prohibitory distinction. In *State v. Folstrom*, 331 N.W.2d 231 (Minn. 1983), a White Earth Indian argued that a state statute prohibiting the possession of an uncased pistol in a motor vehicle or public area without a permit could not be used to justify his arrest for carrying a loaded .44 magnum pistol because carrying pistols was in fact allowed (albeit regulated) in certain circumstances with certain permits. After fully considering the *Butterworth* test, its history, and its problems, the Minnesota Supreme Court rejected it:

> The defendant invites us to adopt the criteria established by the federal court in the case of *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981). In that case the court classified statutes by determining whether they were "civil/regulatory" or "criminal/prohibitory." We decline to adopt this approach. Rather, we prefer a direct approach. Minn. Stat. § 624.714 (1982), is part of our criminal code. It defines possession of a pistol without a permit as a crime and provides criminal punishment. It is a criminal statute.

331 N.W.2d at 233.

The Oklahoma Supreme Court came to a similar conclusion about the *Butterworth* test:

> Some cases that discuss the issue of state regulation of bingo games try to distinguish between the "civil regulatory" or "criminal prohibitory" nature of bingo laws in order to determine whether the state may assume jurisdiction. We find the distinction unpersuasive because it provides no clear distinction between "regulatory" and "prohibitory" as applied to bingo. Most regulations may be interpreted as being in both categories.

State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 90 (Okla. 1985).

The above examples and observations demonstrate the morass into which the civil-regulatory/criminal-prohibitory dichotomy throws courts and litigants. All state laws are subject to debate.[9] Currently in Minnesota the debate over the *Butterworth* rule lives on in the context of video machine gambling, gambling on casino-type variations of bingo, teletrack horse betting, and pari-mutuel wagering over dog races or other contests. In the future, the focus in Minnesota and elsewhere will no doubt shift to other areas such as gun laws, traffic laws, and safety laws of all kinds. The rule of *Butterworth* and *Cabazon* concerning Public Law 280 jurisdiction simply causes more confusion than it resolves.[10] In light of both the legal and practical problems associated with the rule, it should be rejected.

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[9] The ambiguities of the test work both ways. With proper wording of the issue, even laws which courts have found to be civil-regulatory could be deemed to fall into a "prohibitory" category. The zoning laws in *Santa Rosa* could be said to "prohibit" the use of mobile homes as residences in certain areas. The bingo statute in *Butterworth* could be characterized as a prohibition against big stakes bingo for profit. Even the personal property tax laws in *Bryan* could be said to be prohibitions against owning certain types of property without paying taxes thereon.

[10] Even the *Butterworth* court itself acknowledged the difficulty in applying its test, calling the bingo issue "a close and difficult question" which was resolved only by resort to the canons of construction. 658 F.2d at 316. The imprecision of its test was acknowledged when the court conceded that "the regulatory bingo statute *may arguably be interpreted as prohibitory.*" *Id.* (emphasis added). The district court judge in *Oneida* also expressed some trepidation in following *Butterworth*: "I admit to a certain uneasiness in reaching that conclusion. Because it seems a rather mechanical approach to the issue presented, the analysis alone is not wholly satisfactory." 518 F. Supp. at 719.

II. A NEW APPROACH SHOULD BE ADOPTED TO ANALYZE THE EXTENT OF CRIMINAL JURISDICTION TRANSFERRED BY PUBLIC LAW 280.

Minnesota urges the Court to reject the simplistic civil-regulatory/criminal-prohibitory test embraced by *Butterworth*, *Barona*, and *Cabazon*. A new test should be adopted. This test should take into account the role of the state in creating and defining criminal offenses, the unambiguous wording of the criminal portion of Public Law 280 (18 U.S.C. § 1162), and various factors which can indicate whether a state law was intended to be a criminal one or merely a civil one concerned with licensing or regulatory control. The new test should focus on the question of whether a particular law was intended by a state legislature to be "criminal," not whether it was intended to be "prohibitory." Such an analysis would be much more consistent with past precedent and congressional intent than is the *Butterworth* rule. The following approach is suggested.

First, a court should look to whether violation of a state statute involves a criminal penalty. For example, the Minnesota Criminal Code defines a crime as conduct which is forbidden and for which the actor may be sentenced to imprisonment. Minn. Stat. § 609.02, subd. 1 (1984). Although not completely dispositive of the issue for reasons discussed in *Marcyes*,[11] 557 F.2d at 1364, this would be a powerful *prima facie* indication that a statute is a criminal one that can be enforced pursuant to Public Law 280. Similarly, the wording of the statute itself may show that the state legislature intended the law to be a criminal one.

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[11] *Marcyes* discussed the fear that an obviously civil regulation (e.g. a revenue-raising license scheme) could magically be made criminal by the attachment of a minor criminal penalty.

Second, the location of the law in the statute books may be of help. If the law in question is part of the criminal code, is in a section of the statutes dealing with crime, or appears among other clearly criminal statutes, there should be a presumption that it could be enforced under the grant of criminal jurisdiction from Congress in Public Law 280.

Third, the Court should analyze any state judicial precedents which interpret the statute and cast light on whether it has been treated as a criminal law for any state purposes. Judicial precedents should also be examined to determine if the purpose of the law is to control conduct recognized by the courts or statutes as being criminal in nature, *e.g.*, conduct which threatens the public safety, health, or morals. The focus should be on what the state legislature intended. *See, e.g., Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937); *State v. Witt*, 245 N.W.2d 612 (Minn. 1976); *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, 163, 108 N.W. 935 (1906).

When examining the above factors, the Court should keep in mind that Congress in Public Law 280 did not put any limitations on the definition of the terms "offenses" or "criminal laws of such state." It did not say that a law had to be "prohibitory" in order to be considered criminal. The presumption, based on the face of the federal statute, should be that if a state defines a certain statute as a criminal law for its own purposes, such statute should be enforceable under the criminal jurisdiction provisions of Public Law 280.

There is one final factor which should also be considered. If there is evidence that a state has enacted a criminal penalty provision in a statute, or renamed or recodified the statute, solely for the purpose of making a clearly civil-type law enforceable in Indian country, a court should examine such evidence closely. States should not be allowed to use such

subterfuge to make a civil law "criminal" when otherwise it would not have been so considered. If a court is alert for such situations, abuses of Public Law 280 need not occur.

If this Court were to adopt the above test in *Cabazon*, it would require a remand to examine the above factors. Such a remand would make it unnecessary for this Court to rule on the general issues of federal common law and inherent Indian sovereignty as they have been argued in the case. If California has been given jurisdiction to enforce its bingo laws pursuant to specific congressional enactment (Public Law 280), there is no need to examine any further jurisdictional issues. Therefore, Minnesota suggests a remand to consider the *Cabazon* case in light of new guidelines for interpreting the grant of criminal jurisdiction contained in Public Law 280.

Minnesota wishes to add one final note here in light of pending congressional gaming legislation (H.R. 1920, S. 2557, and S. 902) which, if passed, might affect some of the Cabazon Band's rights to operate gaming activities in Indian country. The *Cabazon* appeal should be considered regardless of the actions of Congress. Congressional legislation may not apply to the *Cabazon* situation at all, or a least not for a period of time. If such legislation were to have a "grandfather clause," allowing continuation of activities currently deemed to be legal, the *Cabazon* issues will still remain. Regardless of congressional action, a determination of the legitimacy of the civil-regulatory/criminal-prohibitory test would still be crucial to California, and certainly critical to other states. If left alone without comment, *Cabazon* will be relied on as precedent for the civil-regulatory/criminal-prohibitory test. To allow such precedent to remain would be a disservice to lower courts, states, and all others caught up in the confusion caused by that test. If congressional legislation

does pass, this Court could remand the *Cabazon* case for reanalysis in light both of its holding with regard to the *Butterworth* test and the applicability of the federal legislation.

CONCLUSION

For all the reasons discussed in this brief, the State of Minnesota urges this Court to 1) reject *Cabazon's* civil-regulatory/criminal-prohibitory test for interpreting Public Law 280's grant of criminal jurisdiction, 2) adopt a new test consistent with the suggestions contained in this brief, and 3) remand the *Cabazon* case for consideration in light of the new test.

Dated: August, 1986.

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IN THE

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OF THE

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Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF WASHINGTON, WISCONSIN, AND CONNECTICUT AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

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BRIEF OF THE STATES OF WASHINGTON, WISCONSIN, AND CONNECTICUT AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The states submitting this brief all contain Indian reservations on which Indians are conducting commercial gambling operations, patronized primarily by non-Indians. These gambling operations violate state law. Accordingly, determination of the issues involved in this case will necessarily affect the efforts of these states to apply their criminal laws to these gambling operations.

ARGUMENT

INTRODUCTION AND SUMMARY

By invalidating the provisions of California's criminal code as applied to high-stakes bingo games conducted by Indians on an Indian reservation, the court below has forced upon California a choice that is very disturbing in its practical implications. If California or any other state within the Ninth Circuit is concerned that high-stakes bingo games present a public danger, it can eliminate that danger, at least on Indian reservations, only by completely eliminating, state-wide, bingo games of all sorts, no matter how innocuous. Short of that draconian step, high-stakes bingo games on Indian reservations are beyond the reach of a state's criminal laws and cannot be prohibited, no matter how dangerous the state might judge them to be.

This result, according to the court below, is required by the federal common law, as established by this Court, and by the Congress when it enacted Pub. L. 83-280, 67 Stat. 588 (1953). Because Pub. L. 280 is in effect in the States submitting this brief, the primary focus here is upon the issues raised by that statute, rather than upon the separate set of issues arising under the federal common law. And our basic submission is simply this: In enacting Pub. L. 280, the Congress did not put the Pub. L. 280 States to the inflexible choice which the court below has imposed upon them.

Section 2(a) of Pub. L. 280 provides that the States therein listed:

> * * * shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country * * * to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, *and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.*

(Emphasis supplied).[1]

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[1]Though not listed in § 2, other States, such as Washington, come within its scope pursuant to § 7. See *Washington v. Confederated Tribes of the Yakima Nation*, 439 U.S. 463 (1979).

Section 2(b), however, provides exceptions to the scope of § 2(a) in several specific areas:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The court below has, in effect, fashioned an additional exception to the scope of § 2(a). If a state criminal law is deemed by the court to be "regulatory" in nature, then it is not a criminal law at all for purposes of § 2(a), and is thus outside its scope. That the criminal law in question does not fall within the exceptions found in § 2(b) makes no difference.

To be more specific, in holding that Pub. L. 280 did not authorize the application of California's criminal code to the bingo games involved here, the court below based its holding upon a distinction, developed by that court and by the Court of Appeals for the Fifth Circuit, between state criminal laws which are "criminal/prohibitory" and those which are "civil/regulatory". According to these courts, only the former type of law, and not the latter, are applicable to Indian reservations pursuant to Pub. L. 280. Because the provisions of California's criminal code at issue here did not prohibit all bingo, but only high-stakes bingo, those provisions fell into the "civil/regulatory", rather than the "criminal prohibitory" category, and were thus held invalid.

This distinction is and should be rejected by this Court as fundamentally unsound. It is inconsistent with any fair reading of the language of § 2, and finds no support in the legislative history of Pub. L. 280.

The lower federal courts which have fashioned this distinction purport to base it upon this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976). But that decision does not require or even support any such distinction, which is purely a concoction of the lower federal courts.

Further, this distinction is illusory and impossible to apply in a principled manner, as shown by an examination of the results in the various cases in which the lower courts have attempted to apply it. For it requires those courts to divine a State's "policy" as embodied in the particular criminal statutes involved and to determine, on the basis of the court's perception of that policy, whether a State intends to "prohibit" certain types of conduct, or merely to "regulate" that conduct. The illusory nature of the distinction stems from the fact that criminal laws, when viewed realistically, always do both.

The impact of this distinction is not confined to state law enforcement. It also affects federal law enforcement, as this very case demonstrates. For the distinction has also been engrafted onto the Organized Crime Control Act, 18 U.S.C. 1955, 84 Stat. 937 (1970), as applied to Indians on Indian reservations. That Act makes it a federal crime to operate a gambling business which is "* * * a violation of the law of a State or political subdivision in which it is located." (See J.S. A-25). Thus, the operation of a high-stakes bingo game would be a federal crime in California, if it takes place outside an Indian reservation, but not a federal crime if it is conducted by Indians within a reservation. Surely the Congress did not intend such a double standard, with such a bizarre result.

I. THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION UTILIZED BY THE COURT BELOW IS ILLUSORY AND CANNOT BE APPLIED IN A PRINCIPLED MANNER.

We first trace the development of the "civil/regulatory — criminal regulatory" distinction and examine the conflicting results and conceptual quagmire which it has produced. That development proceeded in three steps. The

first involved the Assimilative Crimes Act, 18 U.S.C. § 13, 62 Stat. 686 (1948), as applied to Indian sales of fireworks. *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). The second involved the Organized Crime Control Act, 18 U.S.C. 1955, 84 Stat. 937 (1970) as applied to Indian-operated dice and card games. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980). And the third step involved Pub. L. 280 as applied to Indian-operated bingo and card games. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and the decision below, *Cabezon Band of Mission Indians, et al. v. County of Riverside, et al.*, J.S. A-1.[2]

Taken together, these decisions purport to apply the "civil/regulatory — criminal/prohibitory" distinction for purposes of all three federal statutes. But the results cannot be reconciled on any principled basis.

In *Marcyes*, the Indian defendants had been convicted in District Court of possessing, on the Puyallup Reservation, certain types of fireworks in violation of Washington law, and thus in violation of the Assimilative Crimes Act ("ACA").[3]

All fireworks, however, were not prohibited by Washington; a very detailed line was drawn between "safe and sane" and "dangerous" fireworks. Nor were "dangerous" fireworks absolutely banned; a permit could be granted for their use for certain limited purposes.[4] Nevertheless, the Court found the Washington statutory system to be prohibitory rather than regulatory. The rationale for this holding is set out in the following passage:

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[2]See also *Oneida Tribe v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981), in which the district court, relying upon *Marcyes* and *Seminole Tribe*, found Wisconsin's bingo law invalid under Pub. L. 280.

[3]While the *Marcyes* opinion does not state explicitly that the defendants were Indians, the opinion in *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) makes this clear. See 694 F.2d at 1188.

[4]This system is contained in Ch. 228, Wash. Laws of 1961, and has been substantially changed since *Marcyes*.

> "Even though the Washington scheme allows for limited exceptions (i.e., public displays, * * * movies, * * *), its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law.

Thus, under the ACA, and presumably under Pub. L. 280 as well, the States have the latitude to determine what types of fireworks are "dangerous to the general welfare of its citizens" and what types are not. *Marcyes*, 557 F.2d at 1365. A state law imposing criminal sanctions for the sale or use of "dangerous" fireworks will be considered as "prohibitory," rather than "regulatory," and will be given effect under the ACA and Pub. L. 280.

Yet, under the decision below by the same court, the States have no similar latitude with respect to certain forms of gambling, such as bingo. That a state criminal law prohibiting certain types of fireworks which the State considers dangerous is "prohibitory" for purposes of the ACA and Pub. L. 280, while a state criminal law prohibiting certain types of bingo which the State considers dangerous is not "prohibitory," is indeed puzzling, and illustrates the illusory nature of the "test" purportedly being applied.

We turn to the second step. In *Farris*, both Indian and non-Indian defendants had been convicted in District Court of violating the Organized Crime Control Act ("OCCA") because of their operation of gambling casinos on the Puyallup reservation. "The casinos, without any approval or license of the Washington State Gambling Commission, featured blackjack, poker, and dice * * * " 624 F.2d at 892, 893.

A short explanation of the Washington law involved may be helpful. Under Chapter 9.46 Wash. Rev. Code, "professional gambling" is prohibited. See Wash. Rev. Code § 9.46.220, which prohibits professional gambling, and Wash. Rev. Code § 9.46.020(17), which defines that term.

That definition, however, and therefore the ban itself, has various exclusions which are found in Wash. Rev. Code § 9.46.030. These include, *inter alia*, certain types of bingo games and also "fund raising events" conducted by bona

fide charitable or nonprofit organizations. See Wash. Rev. Code 9.46.030(1). The term "fund raising event" is defined in Wash. Rev. Code 9.46.020(23), and includes almost all forms of gambling games, including card and dice games, but severely restricts the duration and frequency of the events, the amount of funds that may be raised during such event by the sponsoring organization, the use of the funds raised, and the persons who may operate the event.

Nevertheless, the Court in *Farris* found Washington gambling law to be incorporated into the OCCA, stating: "Washington public policy prohibits the type of gambling business conducted by appellants." 624 F.2d at 895.

Moreover, in *dicta*, the Court indicated that Washington's gambling laws would be applicable to the Indian defendants under the ACA as well.

> "* * * [W]e have held that Washington's prohibitory (but not regulatory) laws can be enforced by the federal government on the Puyallup reservation. *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977); *see United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950). Like the Washington law against the possession of dangerous fireworks, considered in *Marcyes*, the Washington law against professional gambling is prohibitory despite a number of limited exceptions. *See* 557 F.2d at 1364; Wash. Rev. Code § 9.46.220."

624 F.2d at 897.

The result in the decision below cannot be reconciled with the result in *Farris*. The latitude which the Court in *Farris* accorded to Washington's efforts to prevent dangerous types of gambling has been denied by the court below to California. The holdings in *Farris* and the decision below, moreover, are in flat contradiction. *Farris* upheld Washington's law prohibiting card games, while the court below invalidated the Riverside County ordinance prohibiting the same types of games, stating: "We find no basis upon which to distinguish the Tribe's bingo activities from the Tribe's card parlor games." J.S. A-2, n.1.

Such irreconcilable results should not, however, be entirely unexpected, when one considers the problems in-

herent in any effort to apply the "civil/regulatory — criminal/prohibitory" distinction.

As shown by *Marcyes* and *Farris*, the application of that distinction requires the courts to ascertain a State's "policy" with respect to fireworks, gambling, or whatever other subject is involved. The statutes embodying that policy, however, may contain certain exceptions to it, as was the case with the statutes involved in those two decisions. Yet that policy remained effective, and the exceptions made no difference for purposes of the ACA or the OCCA.

But how many exceptions, and what types of exceptions, will result in the policy no longer remaining *the* policy for purposes of these federal statutes? When do the exceptions become the rule, and embody the policy itself? And what criteria are available to a court to determine if and when that transformation in policy has occurred?

In *Marcyes*, for example, the Court viewed Washington's policy as prohibiting dangerous fireworks. But it could just as easily have viewed Washington's policy as permitting fireworks generally, with the prohibition of certain types of uses of dangerous fireworks as the exception.

While the results in *Farris* and *Marcyes* were certainly correct, their rationale, based upon the regulatory-prohibitory distinction and the search for a State's underlying policy, provided the wrong start. Viewed realistically, the statutes involved in those cases carefully balanced various state interests, and thus embodied several policies, all of which were necessary to accommodate those various interests. In other words, they were typical of the mass of state and federal criminal statutes dealing with any complex subject. For this reason, any search for some single, overriding policy in such statutes is futile.

The basic problem can be stated another way: How does a court select the category of statutory provisions to which it should look in finding a State's policy? In *Farris*, for example, should that category have included *all* of Washington's laws relating to gambling? Or just those relating to card and dice games? This second category itself can be divided into two subcategories, one of which was prohibitory and the other of which was permissive. How

does one determine which of all these categories is to be selected as the one which embodies the State's policy?

Further, even if one changes the focus from a search for a State's "policy" to an examination of the terms "regulatory" and "prohibitory," the illusory nature of the distinction remains. All criminal laws are, we would suggest, designed to "regulate" conduct in a very real sense. For they draw lines, often fairly fine, between conduct which is, for one reason or another, desirable in a society and that which is not, and permit the former, while prohibiting the latter. This is true whether the criminal law is one which prohibits shooting a rifle at another human being, but not at a deer, or one which prohibits high-stakes bingo, but permits bingo with modest payouts. Both sets of laws can be correctly viewed as prohibitory; and just as correctly both can be viewed as regulatory.[5]

A final comment regarding *Marcyes* and *Farris*, the first and second steps in the development of the distinction. While *Bryan v. Itasca County*, 426 U.S. 373 (1976) is cited and relied upon in *Marcyes*, 557 F.2d at 1364, that decision does not yet play a central role.[6] But the proper application of *Bryan* becomes critical in the third step, in which the courts dealt directly with the distinction as applied in the context of Pub. L. 280, which is, of course, the same statute as was involved in *Bryan*.

That third step can be briefly described. It consists of a trilogy of cases, beginning with *Seminole Tribe*, in which the Court of Appeals for the Fifth Circuit struck down

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[5]The Court of Appeals for the Sixth Circuit has recently recognized the illusory and unworkable nature of the distinction:

> Finally, we note the criminal/prohibitory-civil/regulatory test requires courts to make arbitrary classifications of state laws. As states frequently pass laws that to some extent both regulate and prohibit a given activity, the test is difficult to apply.

United States v. Dakota, ____ F.2d (No. 85-1568, July 18, 1986) Slip Op. 6.

The court went on to characterize the distinction as "confusing," while acknowledging that it might be proper for purposes of Pub. L. 280; but the court refused to engraft it onto the OCCA. Slip Op. 7. It thereby expressly parted company with the Ninth Circuit. Ibid., n. 3. For further discussion of *Dakota*, see p. ____, *infra*.

[6]*Bryan* is not cited at all in *Farris*.

Florida's bingo statute. That statute prohibited bingo unless the games were conducted by charitable or non-profit organizations, were limited in frequency and payouts, and were operated only by members of the organization. See Florida Statutes § 849.093, quoted in *Seminole Tribe*, 658 F.2d at 311, 312.

Barona, in turn, considered the California bingo statute to be similar to the Florida statute and thus found *Seminole Tribe* to be "persuasive." *Barona*, 694 F.2d at 1188. And the decision below considered *Barona* to be controlling. J.S. A-5.

In *Seminole Tribe*, the Court read *Bryan* as requiring the use of the "civil/regulatory — criminal/prohibitory" distinction, and read *Marcyes* and *Farris* as doing so as well, 658 F.2d at 313, 315. *Barona* read *Bryan*, *Marcyes*, and *Farris* in exactly the same way. 694 F.2d at 1188, 1189.

We therefore take up the critical question: Does *Bryan* require the use of this distinction in the application of Pub. L. 280?

II. *BRYAN* DOES NOT REQUIRE OR EVEN SUPPORT THE USE OF THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION.

In *Bryan*, this Court held that § 4 of Pub. L. 280 does not authorize the taxation of reservation Indians. In so holding, the Court construed § 4, which confers civil jurisdiction upon the States, as authorizing only the application of civil laws by state courts in resolving disputes in which an Indian is a party, and not the whole range of state noncriminal laws. *Bryan*, 426 U.S. at 383.

> "Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; * * *" 426 U.S. at 383.
>
> "This construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' '*State courts to adjudicate* civil

> controversies' arising on Indian reservations, HR Rep No. 848, pp 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." 426 U.S. at 384.

The Court in *Bryan* was not, we must emphasize, construing § 2, the authorization of criminal jurisdiction, but only § 4. Indeed, in construing § 4, the Court limited the scope of that section because it perceived § 4 to be less important than § 2.

> "Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in § 2 of the Act, 18 USC § 1162." 426 U.S. at 380.

There is no suggestion whatever in *Bryan* that the scope of § 2 itself was to be pared back. Nor can any such suggestion be found in the legislative history of Pub. L. 280. See HR Rep. No. 848, 83d Cong., 1st Sess. (1953) and S. Rep. No. 699, 83d Cong., 1st Sess. (1953). See also the unpublished transcript of hearings on HR 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953), referred to in *Bryan*, 426 U.S. at 383, n. 9.

Bryan does, nevertheless, implicitly raise a question about the scope of § 2, which undoubtedly has played a role in the development of the "civil/regulatory — criminal/prohibitory" distinction. Can a State circumvent the holding of *Bryan* engrafting criminal sanctions onto its tax laws, for example, and thereby make them applicable to reservation Indians?

We would agree that the States may not do this. But the reason is not to be found in the illusory distinction developed by the lower courts. Rather, it is to be found in the language of § 2(b). As that language clearly shows, Congress anticipated the possibility that States might use their system of criminal laws, under authority of § 2(a), to impose taxes on reservation Indians, to exercise land use control over Indian property, and to regulate Indian hunting and fishing rights. And Congress, in § 2(b), carefully

excluded from the scope of § 2(a) any such use of its criminal law system.

In short, Congress itself recognized the broad sweep of § 2(a), and explicitly cut it back by adding § 2(b). Nothing in *Bryan* requires that § 2(a) be cut back even further. For it is § 2(b) which prevents any circumventing of the holding and rationale in *Bryan*.

III. THE ORGANIZED CRIME CONTROL ACT DOES NOT INCORPORATE THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION.

The decision below makes an unworkable shambles not only of § 2 of Pub. L. 280, but of the OCCA as well. And it does so in the same manner, i.e., by engrafting the "civil/regulatory — criminal/prohibitory" distinction, and the state "policy" test, onto the OCCA. As stated in that decision:

> In *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), this court held that whether a tribal activity is "a violation of the law of a state" within the meaning of the OCCA depends on whether it is contrary to the "public policy" of the state. *Id.* at 895-96; *Barona*, 694 F.2d at 1190. "Thus, *Farris* makes co-extensive the tests for application of state law to Indian reservations under [the OCCA] and for direct application of state law under Public Law 280." *Barona*, 694 F.2d at 1190. Because we have concluded that bingo games are not contrary to the public policy of California, the activity is not violative of the OCCA. J.S. A-6.

As applied to the OCCA, the result of the decision below is bizarre. The OCCA, 18 U.S.C. § 1955, imposes criminal penalties for the operation of an "illegal gambling business," which is defined as a gambling business which "is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955 (b)(1)(i).

Unlike Pub. L. 280, the OCCA is applicable outside Indian reservations as well as within them. Thus, a high-stakes bingo game would be an "illegal gambling business," and subject to the OCCA, if it took place outside an Indian

reservation in California. For, outside the reservation, there is no reason why the language of the OCCA should not be applied as written.

Yet inside the reservation, that same language must be given a different meaning under the decision below, by reason of the "criminal/prohibitory — civil/regulatory" distinction. And thus an illusory distinction leads to an additional absurd result.

The court below has given no reason as to why Congress might have adopted such a dual standard for the application of the same language. And we would submit that none can be found.

The proper approach in applying the OCCA to Indian gambling operations is that adopted by the Court of Appeals for the Sixth Circuit in *United States v. Dakota, et al.*, ___ F.2d ___, (No. 85-1568, July 18, 1986), *supra*. The Court expressly rejected the "civil/regulatory — criminal/prohibitory" distinction in applying the OCCA to an Indian-operated, tribally licensed gambling operation which included blackjack, dice, and poker. *Dakota*, Slip. Op. 2. The State law involved was Mich. Comp. Laws Ann. 750.301, et seq., which permitted casino gambling of the sort operated by the Indian defendants, but only if it was not "commercial," i.e., only if the operator was a bona fide religious, educational, service, senior citizens, fraternal or veterans organization which operated the gambling games without profit. Ibid. 7, n. 4. Because the defendants operated the games for profit, the games were non-commercial; thus, a violation of Michigan law was found, and the OCCA was held applicable.

The court's approach was straightforward, relying upon the plain language of the OCCA and the Michigan law:

> Free from the constraints of the confusing criminal/prohibitory-civil/regulatory analysis, resolution of the instant appeal is not difficult. The issue becomes simply whether the Dakotas' gambling business is in violation of the laws of Michigan. Clearly, it is.

Ibid. 7.

By this approach, the court avoided the double stand-

ard which the court below has read into the OCCA, under which the OCCA changes meaning as it crosses the reservation boundary.

Such a straightforward approach is especially appropriate in cases such as *Dakota* and the case at bar, in which the application of the OCCA presents no possible conflict with an Indian treaty right.[7] This is shown by *United States v. Dion*, ___ U.S. ___, (No. 85-246, June 11, 1986, 54 L.W. 4615), in which the Court upheld the conviction of an Indian for shooting bald eagles within a reservation in violation of the Endangered Species Act, 16 U.S.C. § 1531, et seq., 87 Stat. 884, as amended. Having determined that the Eagle Protection Act, 16 U.S.C. § 688 et seq., 54 Stat. 250, abrogated any treaty right to the hunting of bald eagles, the Court applied the Endangered Species Act in accordance with its terms, despite the silence in that Act and in its legislative history regarding Indian hunting rights. See 54 L.W. at 4617, 4618.

The Court found no double standard in the Endangered Species Act, one for reservation Indians and another for everyone else. Nor should the Court find one in the OCCA.

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[7]So far as we can tell, the Appellees make no claim that they have a treaty right to run gambling operations which cater to non-Indians. And even if they did, such a claim would not bar the application of the OCCA, even in the Ninth Circuit, as shown by *Farris*. See 624 F.2d at 893.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

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OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, et al.,
Appellants,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE SAN MANUEL BAND OF MISSION INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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No. 85-1708

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BRIEF OF THE SAN MANUEL BAND OF MISSION INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

I
INTEREST OF AMICUS CURIAE

Amicus Curiae San Manuel Band of Mission Indians ("Tribe") is a federally recognized Indian tribe whose reservation is near the County of San Bernardino, State of California. The reservation is comprised of approximately six hundred fifty acres, of which only approximately eight acres lie on flat, commercially usable land. The remainder of the reservation consists of steep mountain terrain. Until recently, the Tribe has had no method of generating income or providing employment for its families, many of whom are on welfare.

In July, 1986, the Band commenced playing bingo on its reservation pursuant to a tribal ordinance authorizing the Tribe to engage in bingo for tribal charitable purposes only. The revenue the Tribe hopes to generate from that activity will be used to fund programs for the general health, welfare and education of the tribal community. Nearly eighty percent of the Tribe members, many of whom were on unemployment rolls for years before the bingo project began, immediately became employed and are receiving their first vocational training of any kind.

The Tribe, like other tribes throughout the country engaging in charitable bingo to raise funds and provide jobs for the general welfare of their members, faces suits[1] seeking to bring such fund-raising activity under State and local governmental control. This despite the fact that the cases frequently cited by appellants, including *Rice v. Rehner,* 463 U.S. 713 (1983), and its predecessors, compel an opposite result. Since this case focuses upon California's attempt to now obtain jurisdiction over a matter which will directly affect the ability of the Tribe to generate resources without State or federal aid for educational, employment and other Tribal purposes, the Tribe's interest in its outcome is acute.

II

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief will argue that every case relied on by Appellants and *amici* who join with them, and the deci-

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[1] *City of San Bernardino v. San Manuel Tribe of Mission Indians,* Central District of California, Case No. CV 85-6899 WJR (Bx); *City of San Bernardino v. Area Director, Sacramento Area Office, Bureau of Indian Affairs,* Docket No. IBIA 86-22-A.

sion below,[2] demonstrate a consistent approach in determining when and under what circumstances State law will be applied to activities on Indian reservations under Public Law 83-280, 67 Stat. 588 (1953) ("Pub.L.").[3]

Perhaps even more importantly, however, is the need to establish first that there is nothing in the result below which leaves any gap in the State's concerns regarding gambling[4] or the ability of law enforcement to protect against organized crime on Indian reservations. Indeed, it is in the tribe's best interest that adequate protection against such conduct is available, and ample State and federal law exists to assure that it is.

Bingo has traditionally been separated in the minds of the public from "gambling" as that term is generally used, e.g., casino-type gaming (blackjack, roulette, craps and the like), even though the inclusion of bingo within the technical definition of gambling cannot be denied. Bingo is played for fund-raising purposes under a variety of rules and regulations in virtually every state by religious organizations, fraternal groups, senior citizens groups, and by many of the states themselves, as well as at most American, British and other armed forces bases throughout the world. An Air Force Base located just a few miles from appellant City of Riverside's borders

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[2] *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 902-903 (9th Cir. 1986).

[3] 18 U.S.C. § 1162, 28 U.S.C. § 1360.

[4] Appellants repeatedly refer to the subject of California's "gambling" laws (Brief of the Appellants, pp. 8, 22), whereas the issues herein concern only the legally and historically distinguishable games of bingo and a limited form of state-sanctioned card games which are played on the Cabazon reservation. Since Amicus and most tribes interested in these issues from a fund-raising viewpoint are only involved in bingo this brief will address that game only.

regularly awards bingo prizes which are substantially greater than those permitted under California law. It is therefore more than happenstance that California's voters adopted bingo as an acceptable way to raise funds for charitable purposes without specifying any particular guidelines. (Calif. Const., art. IV, § 19.)

Charitable bingo is not insignificant economically. Last year alone the estimated proceeds from charitable bingo in the United States, excluding bingo played on military and Indian reservations, exceeded a billion dollars.[4a] Therefore, if bingo, in particular, attracts organized crime at all, which we dispute, the States should be as concerned about State-sanctioned bingo as with Indian bingo, since both generate large sums of cash revenue. Yet the measures taken by California to protect against criminal involvement in its own bingo games are far less than those imposed on tribes by the federal government, particularly when bingo is played on Indian reservations with the managerial assistance of non-Indians. Additional guidelines are also pending in Congress.[5]

It is in the foregoing context, which could be readily examined by the lower courts, that it was correctly determined the conduct of bingo games by Indian tribes on their reservation for tribal fund-raising purposes is not against California's public policy. Utilizing long-standing principles of statutory construction, as this Court did in deciding *Bryan v. Itasca County,* 426 U.S. 373 (1976) and *Rice v. Rehner, supra,* the court properly found that California's statutes regulating bingo do not fall within the scope of the criminal provisions of Pub.L. 280 (18 U.S.C. § 1162), which control State jurisdiction over Tri-

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[4a] *Gaming & Wagering Business,* Vol. 7, No. 7 (July, 1986), p.28.

[5] H.R. 1920, S. 902.

bal activities,[6] since that statute was directed at truly criminal conduct in the common law sense and not at laws which are merely a part of a State's regulatory scheme.[7] Similarly, California's bingo laws are not the kind of laws Congress intended would be applied under Pub.L. 280's civil provisions (28 U.S.C. § 1360), since they are merely regulatory in nature. *Bryan v. Itasca County, supra.* Since Pub.L. 280 controls State criminal and civil jurisdiction over tribal activities in states which are subject to its provisions, California's bingo regulations cannot be imposed upon tribal bingo conducted on Indian reservations within its borders.

ARGUMENT

III

APPELLANTS ARE INCORRECT IN THEIR ASSERTION THAT WITHOUT STATE CONTROL, BINGO ON INDIAN RESERVATIONS WOULD CREATE A GAP IN LAW ENFORCEMENT

Appellants and their supporting *amici* argue that without the application of State regulation, bingo games

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[6]We disagree with the State's contention that if Pub.L. 280 does not apply, principles of "federal common law" nevertheless confer such jurisdiction. Were that the case, then there simply would be no need for Pub.L. 280, nor would this Court's limitations on Pub.L. 280's importation of a State's civil laws which are regulatory in nature have any meaning. *Bryan v. Itasca County, supra.* The analysis of Pub.L. 280's preemptive effect has been briefed extensively by appellees and other *amici* and will not be repeated here.

[7]Similar reasoning was applied by the court below concerning the exclusion of California bingo statutes from the meaning of the phrase "gambling business which . . . is a violation of the law of a State," under the Organized Crime Control Act (18 USC § 1955 (1976) ("OCCA"), *Cabazon, supra,* 783 F.2d at 903.

conducted for charitable purposes on Indian reservations would be unusually vulnerable to organized crime infiltration and other criminal conduct. Brief of the Appellants at 8, 26 and 29. The apparent concern is that the amount of cash revenue which might be generated by these games would create an atmosphere in which embezzlement, skimming, and fraud could flourish and that absent State intervention, there would be no way to deter such conduct. *Id.*, at 8, 25. Because of the importance placed on this premise by Appellants as a rationale for resolving any doubt in their favor, we feel it necessary to address the realities of Appellants' concern before disputing their assertion that they have a legal right to control charitable bingo on Indian reservations under Pub.L. 280.

The State's fear of Indian bingo-related crime is placed in its proper perspective when one examines the degree to which State-sanctioned bingo is now permitted to exist and flourish. In 1976, California voters approved Proposition 9 by more than a 2-to-1 margin, which amended the State Constitution to allow the Legislature to authorize cities and counties to permit the playing of bingo for charitable purposes. Calif. Const., art. IV, § 19. No other limits were placed in the Constitution. *Id.* Thus, all regulation was left to State and local control. *Id.* State legislation was enacted which set some limitations but additional regulation was left to Cities and Counties. *California Penal Code*, § 326.5. The regulations adopted by the Legislature include a limitation on the size of the prizes and restraints on those authorized to operate the games.[8]

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[8] "(h) A bingo game shall be operated and staffed only by members of the authorized organization which organized it. . . .

. . . (n) The total value of prizes awarded during the conduct of any bingo games shall not exceed two hundred fifty dollars ($250) in cash

The selection of bingo as a fund-raising tool was not surprising. Bingo holds a unique position historically and has often been treated separately from true gambling. Because it is usually associated with charitable, public or social organizations, it has been generally thought of as more of a fund-raising and social activity than as a traditional form of gambling such as that found in Las Vegas casinos.[9] *See, Gambling In America, Final Report Of The Commission On The Review Of The National Policy Towards Gambling,* Washington, 1976. Indeed, such activities have been an important and publicly accepted part of our culture. *See, Charity U.S.A., An Investigation Into The Hidden World Of Multi-Billion Dollar Charity Industry,* Bakal (Times Books, 1979), p. 333. Lotteries, which are similar to bingo, helped to build Harvard, Yale, Princeton, Brown, Dartmouth and Columbia. *Id.* Many early churches, bridges, canals and roads were similarly financed. *Id.* Some of the funding for the American War of Independence came directly from such activities, and had among its proponents George Washington, Benjamin Franklin, and Thomas Jefferson. *Id.,* at 334.

Catholic churches employed bingo in the United States as far back as the early 1800's. The Church made it so popular that by the 1920's it had come to be identified as a "Catholic" game. *Id.,* at 335. Bingo achieved its height of popularity during the American Depression, when many people were unable to participate in higher-priced forms of recreation. They turned to bingo as an inexpensive and popularly accepted alternative. *See, Encyclopaedia Britannica,* p. 824.

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or kind, or both, for each separate game which is held." *California Penal Code,* § 326.5 (1981).

[9]In fact, California Constitution, art. IV, § 19, specifically prohibits "casinos of the type currently operating in Nevada and New Jersey."

From these beginnings, bingo has become associated with fund-raising for society's most respected institutions, including schools, churches, synagogues, hospitals, fraternal orders, civic clubs, veterans groups and volunteer firemen. *Charity U.S.A. supra,* at 334. Signs indicating "Bingo Tonight" have become commonplace throughout the United States, even in States where gambling (except horse-racing and lotteries) is strictly outlawed. For example, it was reported that in one such State which had no regulations directed at bingo in particular, many groups nevertheless openly advertise, on billboards and in phone directories, bingo games with cash prizes of thousands of dollars per night. Law enforcement apparently does not regard this as prohibited "gambling" or particularly worrisome because, as one police official put it, "public sympathy is with the charitable organizations." *Id.* at 334.

Bingo for prizes is also seen as an acceptable way to provide a source of social satisfaction for many people. Senior citizens, for example, are often attracted because of the opportunity it provides to meet and converse with one another. Senate And Assembly Committees On Governmental Organization, *Transcript of Proceedings, Interim Hearing on Bingo Regulations,* November 2, 1983, pp. 132, 170 (hereinafter "Calif. Legis. Proceedings"). California's legislative scheme even added "senior citizens' associations" to the otherwise tax-exempt groups which are authorized to conduct bingo games. *California Penal Code,* § 326.5(b).

Bingo games have been conducted by the United States government on military reservations in California since at least 1951. *See, Calif. Legis. Proceedings,* Testimony of John Hawley, President of Western Gift Distributors, p. 108. In fact, bingo games can be found on American

military bases worldwide. *Id.*, at p. 109.[10] At Norton Air Force Base, which borders San Bernardino, California, members and guests of its NCO Club are invited to play bingo games in which prizes far exceed those permitted under California law, including prizes of a $2,500 savings bond or a percentage, or sometimes all, of the monies collected for playing that game. *See* Appendix A.

Closely related to bingo, of course, are lotteries that have been used for raising funds for public purposes for hundreds of years. *See, Charity U.S.A., supra.* Such lotteries currently involve revenues and prizes in astronomical sums.[11]

The foregoing demonstrates that the *act* of engaging in these special forms of gaming is far from being "so fundamentally evil" that the State has sought to prohibit them within its borders as contravening public policy. *Iowa Tribe of Indians of Kansas and Nebraska v. Kansas,* 787 F.2d 1434, 1436, n. 1 (10th Cir. 1986). Bingo and lotteries for fund-raising purposes are thus not only sanctioned by the State of California itself, but also by a substantial number of its organizations within its boundaries that are dedicated to preserving the moral, ethical and religious values of its members. It is in this context, then, that charitable bingo is conducted in California on a large-scale basis.

In 1983, more than $30 million in gross revenues were collected at bingo games conducted in the City of Los

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[10]Moreover, bingo is the only gaming activity sanctioned and permitted by the British Armed Services on their military bases. *Encyclopaedia Britannica,* p. 824.

[11]A recent winner in the California lottery won a $10,000,000 prize, and higher prizes are well known to have been awarded in other states.

Angeles alone. *See, Calif. Legis. Proceedings,* p. 8 (testimony of Robert D. Burns, General Manager, Los Angeles City Department of Social Services). Some charities have been known to run as many as fifty games in one session. *Id.,* at 138. A single game run at a school in Sacramento, California, grossed more than $2.2 million in one year. *Id.,* at 144.

Bingo "centers" have begun to emerge in different parts of California. For instance, in Sacramento various church groups and charities rent space in a bingo center capable of running nine different games during the same evening. In Los Angeles, a particular charity draws approximately 600 people per session and runs four or five times weekly. *Id.,* at 18. Jack Scheidegger, legislative liaison for the State Attorney General, testified in 1983 that under the current law large-scale bingo operations are emerging. Some charitable organizations pay up to $62,000 per year to lease space in bingo centers for approximately ten hours per week. *Id.,* at 25.

Notwithstanding the large amount of cash involved in these games, the State does little to control them in a way that would have any meaningful impact on organized crime control or criminal activity in general, if that were really a concern. While the size of the prizes per game is limited, the number of games played per evening, admission prices charged, and the number of persons who may play each game is virtually unrestricted. As seen by the statistics above, this results in substantial sums of cash changing hands, which is alleged to be the attraction to organized crime because of its supposed potential for skimming and embezzlement.[12] *But in California there is*

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[12]Examples of skimming can be found in *United States v. Levenson,* 524 F. Supp. 781 (S.D.N.Y. 1981), and *United States v. DeLuna,* 763

no commission, board or other State body which supervises the operation of bingo games in any way. Nor do California's statutes address the identity, backgrounds or qualifications of those who operate the games, other than that they be members of the organization for whose benefit the game is being played. *California Penal Code,* § 326.5(h). While one would hope that all members of any religious, civic or other organization purporting to use the proceeds from its bingo games for charitable purposes were free from criminal ties or intent, common sense would tell us otherwise. Although the statutory scheme requires that the proceeds from the game be retained in a special fund and not commingled with the organization's other funds (*California Penal Code,* § 365.5(j)), there are no restrictions on the way in which the funds are to be collected, handled, counted, and the like. In California, only fourteen percent of bingo-playing cities contacted by the State legislature in 1983 had any mechanism for auditing the games within their particular jurisdictions. Only five counties within the State require any audits at all, meaning that sixty-five percent of the counties state-wide have no auditing requirements of any kind. *See, Calif. Legis. Proceedings, supra,* comments of Co-Chairman Richard Alatorre, page 120.

Finally, the sale of "pull tabs", which are cards having numbers or symbols concealed and preprinted in a manner providing for distribution of prizes (presumably up to $250 each), is expressly permitted at bingo games. *Cali-*

F.2d 897 (8th Cir. 1985) and involve the removal of cash proceeds prior to counting or reporting. This results in a wilful evasion of federal tax laws, 26 U.S.C. § 7201 *et seq.* Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Moore v. United States,* 160 U.S. 268, 269-270 (1895); *Woxberg v. United States,* 329 F.2d 284 (4th Cir. 1964).

fornia Penal Code, § 326.5(o). There is no limit on the number of such cards which may be handled or sold during any given bingo session.

In sum, the State's interest in preventing the entry of organized crime, which traditionally is linked with skimming and other crimes relating to cash, is not prevented by the present regulatory scheme, since no safeguards against such practices are addressed.

On the other hand, the basic concern that bingo, because of its involvement with cash, will attract organized crime to any greater degree than any other type of cash intensive enterprise (e.g. movie theaters, fast food stores, and the like) is unfounded. Unlike casino-type gambling where every bet is a quick, unreceipted cash exchange, bingo players must purchase bingo cards or tabs in advance to play. Thus all revenues can be documented, thereby minimizing the opportunities for skimming and embezzlement if reasonable management safeguards required of any business are employed. And where the fear is that organized crime will nevertheless have a special opportunity to infiltrate reservations when tribes require non-tribal managerial assistance (although the States never explain why the same opportunity is not feared where non-Indians are involved in other tribal activities), the federal government already does far more than California has ever considered doing in protecting the interests of both Indian tribes and the general public against possible criminal conduct. 25 U.S.C. § 81 requires that contracts between Indian tribes and non-Indians relative to Indian lands or properties be approved by the Secretary of the Interior, and invalidates contracts that do not bear that approval. *In re Sanborn,* 148 U.S. 222, (1893). Several recent appellate court decisions have specifically ruled that management contracts between tribes and non-

Indians hired to assist the tribe in managing and operating bingo games are, pursuant to 25 U.S.C. § 81, null and void absent the required approval. *A. K. Management Company v. San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986); *Wisconsin Winnebago Business Committee v. Koberstein & Ho-Chunk Management Corporation,* 762 F.2d 613 (7th Cir. 1985).

The federal approval process involves thorough background investigations of management personnel, including a Department of Justice inquiry to check for possible criminal associations. *See,* Appellee's Motion to Dismiss Appeal or Affirm Judgment, Appendix, p. 66a. The management agreements must also fix a limited time to run, specify the amount of the contractor's fee, include a list of all parties in interest to the contract plus their respective residence and business addresses, require the tribe to receive monthly statements showing revenue and expenses, provide for an independent audit by a certified public accountant, set forth accounting procedures, allow the tribe access to all books and records, establish a cash management system adequate to safeguard the funds of the operation, and provide the tribe the right to oversee such a system. *Id.,* at 64a-68a. This process therefore involves far more scrutiny than would be provided under California law, while at the same time recognizing that many tribes may lack the expertise to engage in fundraising activities without such outside assistance. That need would be frustrated totally if Tribes were subjected to California's limitations on the operation of charitable bingo games, which in no way take into account the unique factors that distinguish Tribes from other organizations and governing bodies. Indeed, Congress has moved to formalize such regulations in its introduction and present consideration of H.R. 1920 and S.902.

Moreover, the absence of State control over Indian bingo would in no way leave a law enforcement gap should problems arise. Skimming is obviously a federal crime under the Internal Revenue Code and other federal and State laws, and no one has seriously contended that there is inadequate criminal jurisdiction to scrutinize and prosecute such activity. *See, e.g.,* 26 U.S.C. § 7201. More common crimes, such as fraud and embezzlement, are, of course, subject to State jurisdiction under Pub.L. 280.[13]

These are *not,* therefore, issues which are truly involved in this case, although Appellants and *amici* have tried to make it seem that the tribes, if successful, will create havens of immunity from criminal sanctions. The fact the record is devoid of any evidence of uncontrolled criminal conduct associated with bingo, either off the reservation or on, despite the fact that bingo has been played on Indian reservations in California and other States for several years and by other organizations off the reservations for much longer, simply underscores that reality. The court below correctly determined that the fear of criminal activity was entitled to little if any consideration.[14]

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[13]18 U.S.C. 1162. *See,* e.g., *United States v. Marcyes,* 557 F.2d 1361, 1364 (9th Cir. 1977).

[14]783 F.2d at 904.

IV

THE *CABAZON* COURT FOLLOWED A TRADITIONAL ANALYSIS, CONSISTENT WITH THIS COURT'S HOLDINGS IN *BRYAN V. ITASCA COUNTY* AND *RICE V. REHNER*, IN RULING THAT CALIFORNIA'S BINGO STATUTES CANNOT BE APPLIED TO TRIBAL BINGO CONDUCTED FOR CHARITABLE PURPOSES ON INDIAN RESERVATIONS UNDER EITHER THE CRIMINAL OR CIVIL PROVISIONS OF PUBLIC LAW 280

In *Cabazon*, appellants argued that California's bingo statutes were applicable to the reservation under the criminal and civil provisions of Pub. L. 280. The court rejected appellants' claim. In reaching its result, the court followed its earlier decision in *Barona Group of Capitan Grande Band, etc. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), which held California's bingo laws could not be applied to tribal activities on a reservation. The analysis employed by the court was the same utilized by virtually every court which has had to determine if a State law could be imposed on a reservation.

With respect to Pub.L. 280, the court in *Cabazon* and *Barona* first determined that California's bingo statutes did not fall within the kind of "crime" intended to be included within that statute. The court then concluded that as a law which was civil and primarily regulatory in nature, application of the bingo statutes on Indian reservations under Pub.L. 280 would also be contrary to and outside the scope of that law when civil provisions of Pub. L. 280 are viewed against long-established principles of tribal sovereignty and self-government.

A. The Criminal Provisions of Public Law 280

Public Law 280 is divided into two sections, one pertaining to criminal matters (codified at 18 U.S.C. § 1162(a)), and the other to civil laws (28 U.S.C. 1360). Taken together, these sections represent an express delegation by Congress of State criminal and civil jurisdiction over reservations in states such as California which are subject to its terms. Although there has been much debate over whether laws coming under its mane are "criminal/prohibitory" or "civil/regulatory" in nature, an analysis of the cases in the area, including those cited by Appellants which are claimed to be in conflict with, or rejecting of, that distinction, reveal a complete consistency in approach by all courts which have examined Pub. L. 280 and other federal statutes purporting to apply State law to reservations, regardless of the outcome of the particular cases. The only difference among these decisions would appear to be factual in nature.

Indeed, we see no reason to go beyond analyzing these cases on the basis of 1) whether the State statute in question falls within the federal statute's meaning of a crime and, if not, 2) whether as a civil law it is regulatory in nature so as to conflict with the principles enunciated in *Bryan v. Itasca County*. Thus, we submit that such an analysis represents the only meaningful distinction between the terms "criminal/prohibitory" and "civil/regulatory." In making these determinations, this Court has clearly announced that any analysis of Congressional intent in enacting those statutes must be undertaken against a backdrop of tribal sovereignty. *Rice v. Rehner, supra,* 463 U.S. at 719.

Section 2(a) of Pub.L. 280, as codified at 18 U.S.C. § 1162(a), provides:

> "a) Each of the States . . . listed in the following table shall have jurisdiction over *offenses* committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over *offenses* committed elsewhere within the State . . . and the *criminal laws* of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . : California . . . all Indian country within the State." [Emphasis added.]

The first question in analyzing the applicability of Pub.L. 280 in the instant case is therefore whether or not California's bingo regulatory scheme encompasses the kinds of "offenses" and "criminal laws" intended by Congress in enacting that statute. In determining that it does not, the Ninth Circuit in *Cabazon* followed its earlier decision, in *Barona Group of Capitan Grande Band, etc. v. Duffy, supra,* 694 F.2d at 1187, which had this exact issue before it. *Barona* held that California's bingo statutes were not the kind of laws intended by Congress to be swept under the criminal provisions of Pub.L. 280 (18 U.S.C. § 1162). Finding they were not, and were therefore civil in nature, the court further held they also were not the kind of civil laws intended by Congress to be included within the civil scope of Pub.L. 280, since they simply regulated the licensing and playing of bingo and thus fell within the proscription of *Bryan. Barona Group of Capitan Band, etc.* v. *Duffy, supra,* 694 F.2d at 1184.

The need for the kind of analyses employed in *Bryan* and carried forward through *Barona* and *Cabazon* was explained in this Court's opinion in *Johnson v. Yellow Cab Transit Company,* 321 U.S. 383, (1944). That case focused on various Oklahoma statutes prohibiting the possession and transportation of liquor and whether or not they

could be applied under the assimilative crimes statute (18 U.S.C. § 468) to deliveries of liquor which were clearly intended for a federal military reservation within the State, which Oklahoma had intercepted. The carrier sued, alleging the seizure constituted an unlawful interference with its authorized interstate transportation. Oklahoma contended that the assimilative crime statute applied. That federal statute stated that anyone who committed an act within a federal enclave, which act, if occurring within the state in which the enclave is located, "would be penal," would "be deemed guilty of a like offense and be subject to a like punishment." *Id.*, at 388-389. Oklahoma argued that all of its statutes relating to liquor were enforceable under those provisions, including penalties imposed for violating its import regulations, and that therefore the shipment of liquor to the military reservation located within the State of Oklahoma was subject to Oklahoma criminal jurisdiction.

The Court stated that while the issues could not be finally determined because all parties, particularly the United States, were not before the Court, there was serious doubt about whether the mere fact that the Oklahoma liquor statutes were criminal *on their face* necessarily required their adoption under the language of the federal statute which referred to the State's "penal" laws:

> "The Oklahoma liquor statutes pertaining to liquor imports provide one illustration of the difficulties inherent in this question. These penal statutes are designed to enforce a system of licensing such imports by special permits issued by a state agency. Okla. Stat. (1941) title 37, §§ 41-48. Importation of liquors without a special permit is made penal. *Id.*, §§ 41, 46. To hold, therefore, that the assimilative

> crimes statute adopts Oklahoma's penal liquor laws the Court might further have to hold that that statute compels federal officials on the Fort Sill Reservation to apply for and obtain state permits before they can lawfully import any liquors for any purpose. And a strong argument might be made that *had Congress intended such a drastic result, it would have considered the problem and used more express language.*" Id., at 389, n.8. (Emphasis added.)[15]

In determining whether a federal law purporting to apply a State's criminal laws to federal territory is applicable to a *specific* State statute, *Yellow Cab* therefore makes the logical suggestion that the full ramification of adopting the State statute in question must be considered in light of the purpose and history of the relevant federal law. *Id.*, 321 U.S. at 389-390; *see also*, *Bryan v. Itasca County*, *supra*, 426 U.S. at 381; *Rice v. Rehner*, *supra*, 463 U.S. at 723-726. This becomes particularly important where adoption of a State law under the inclusion provisions of a general and somewhat ambiguous federal law such as Pub.L. 280 could undermine tribal sovereignty and self-government. *Bryan v. Itasca County*, *supra*, 426 U.S. at 388.[16]

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[15]*Compare, Rice v. Rehner, supra*, 463 U.S. at 726, where this Court held, after taking into account the particular and unique history behind its adoption, that Congress did intend 18 U.S.C. § 1161 to require liquor sellers on Indian reservations to obtain State liquor licenses if necessary to comply with State laws.

[16]In that case, discussed in more detail *infra*, p. 86 et seq., this Court held that the provisions of Pub.L. 280 which refer to a State's civil laws were not meant to incorporate civil laws that would have the effect of regulating conduct in conflict with tribal self-government. *Bryan v. Itasca County*, *supra*, 426 U.S. at 388.

The willingness of courts to consider Congressional intent when deciding if a particular State statute is to be included within a federal law which purports to adopt State criminal law was addressed in *United States v. Marcyes, supra.* In that case two members of the Puyallup Indian reservation were accused of operating fireworks stands on a reservation which was open to the public. Some of the fireworks being sold were illegal under State law. The sellers were arrested and charged in district court under the Assimilative Crimes Act. 18 U.S.C. § 13. Defendants argued that the act only incorporated the general criminal code, or "prohibitory laws", of State and could not be used to enforce Washington's fireworks laws, which defendants argued were not truly criminal in nature but were merely civil laws regulating the sale and possession of fireworks. *Id.*, at 1364. Referring to *Bryan*, defendants additionally argued that the concept was even stronger because an Indian reservation and the attendant principles of tribal sovereignty were involved. *Id.* The Ninth Circuit rejected the argument, but not on its analytical basis. The court acknowledged that:

> "[A] strong argument exists that Congress did not intend to include the penal provisions of a state regulatory system within the ACA. The rationale for this argument is obvious; a state could thereby enforce its regulatory system on the federal jurisdiction by making criminal any failure to comply with those regulations (i.e., licenses, permit , etc.)." *Id.*, at 1364.[17]

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[17]The court added the further qualification, however, that the mere fact that the law is not primarily for licensing purposes is not determinative. 557 F.2d at 1364.

Nevertheless, the court found that the Washington fireworks statutory scheme was in fact the kind of "penal law" envisioned under the Assimilative Crimes Act, since "its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law." *Id.*, at 1364.

The importance of *Marcyes* is not that the court correctly or incorrectly determined that the fireworks statutes were the kind of penal laws referred to in the Assimilative Crimes Act; rather, *Marcyes* (as well as *Rice, Bryan* and *Yellow Cab*) demonstrates that federal courts must determine the contextual meaning of words such as "criminal" or "penal" in federal legislation in order to avoid the potentially anomalous results described in *Yellow Cab. See, also, Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, supra*, 518 F. Supp. at 714. This is particularly true where Indian interests are concerned. *See, e.g., United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Marcyes, supra.*

In *United States v. Farris, supra,* the Ninth Circuit conducted a similar analysis and concluded casino-type gambling on an Indian reservation was in violation of the Organized Crime Control Act of 1970, 84 Stat. 937,18 U.S.C. § 1955 ("OCCA"). That statute makes it a crime to engage in an illegal "gambling business" which "is a violation of the law of a state or political subdivision in which it is conducted." The court concluded under the facts that like the fireworks statute in *Marcyes*, the Washington law against professional gambling was truly criminal[18] within the meaning of the OCCA, despite the State

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[18]Black's Law Dictionary provides definitions of those crimes which were considered at common law to be "malum in se" ("a wrong

law's exceptions. *Id.*, at 897. The lower court recognized the specific environment for organized crime which existed in casino type gambling[19] and found that the nature of the particular activity involved was against the public policy of the State of Washington and therefore constituted the kind of gambling business which was squarely within the meaning of the federal statute. *Id.*, at 897.

Consistent with the foregoing cases is *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), which examined whether a set of Florida statutes permitting bingo games to be played by certain qualified organizations were "criminal" under Pub.L. 280, or, if civil, were regulatory so as to infringe on tribal rights. In order to first determine if the statutory scheme constituted a criminal prohibition under Pub.L. 280, the court examined "whether the operation of bingo games is prohibited as against the public policy of the state or merely regulated by the state." *Id.*, at 313. In doing so, the court examined various state court decisions which discussed the constitutionality of the bingo statute, observing that in *Carroll v. State,* 361 So. 2d 144 (Fla. 1978), "exercising this power to regulate, the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, a[illegible] at the same time, has allowed worthy

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in itself, an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral and public law"), and those which were merely "malum prohibitum" ("a wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law. Contrasted with *malum in se*.") *Black's Law Dictionary*, 4th Ed. Rev., p.1112. *See, Iowa Tribe of Indians of Kansas and Nebraska v. Kansas*, 787 F.2d 1434 (10th Cir. 1986) [the playing of bingo considered not to be "fundamentally evil"].

[19] *See*, discussion *supra*, at 14-16.

organizations to receive the benefits. (Citations omitted)". *Seminole Tribe of Florida v. Butterworth, supra,* 658 F.2d at 314. The Fifth Circuit determined that the underlying act of bingo was not against Florida's public policy and that therefore the bingo law was not criminal in nature within the meaning of Pub.L. 280. *Id.*, at 316. The court then analyzed the regulatory effect of the bingo laws and determined that if they were applied to reservations in Florida under the civil provision of Pub.L. 280, they would interfere with statutory policies of tribal self-government, which was beyond the scope of Congress' intent in enacting those provisions of Pub.L. 280. *Id.*, at 314-315.

Again, the particular result reached by the court in *Butterworth* is significant for the process employed: lower courts, with an opportunity to examine all of the facts surrounding the nature of the particular activity in question, the proposed form of regulation, and the potential interference with tribal sovereignty (not unlike the type of test suggested by amicus, State of Minnesota, at pages 21-23 of their brief) are in a proper position to determine whether or not, against a backdrop of strong policies in favor of tribal sovereignty and self-government, the State statutory scheme in question comes within the meaning of the federal statute being considered.

The same approach was illustrated in *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, supra.*[20] The district court expressly considered the following questions in determining whether Wisconsin's bingo laws conferred State jurisdiction under Pub. L. 280:

> "(1) whether Wisconsin's bingo laws are civil or criminal; and (2) what Congress intended when it

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[20]518 F.Supp. 712 (W.D. Wisc. 1981).

> passed Public Law 280 and conferred jurisdiction on the State of Wisconsin to enforce its criminal laws in Indian country." *Id.*, at 714.

After considering the nature of the State regulations themselves and the factual context in which they were being applied, the court concluded that Wisconsin's bingo laws were civil rather than criminal under Pub.L. 280, and as such could not be imposed upon the reservation because they were merely regulatory in nature. *Id.*, at 719. The court found that the Wisconsin legislature had determined the act of bingo-playing to be generally beneficial and had "chosen to regulate rather than prohibit" such activity, thus removing the State statutory scheme from being considered "criminal" within the meaning of Pub.L. 280. *Id.*, at 719. The court admitted to a "certain uneasiness" in reaching this decision because it seemed a rather "mechanical approach," but when coupled with its review of the background against which the federal law had to be read, (see, *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164) (1973), pronounced itself "satisfied that the conclusion reached on [the motion pending before the court] is based on sound principles of construction of laws pertaining to Indian tribes and of current policy regarding tribal independence." *Oneida, supra*, 518 F.Supp. at 719.

In 1982, the Ninth Circuit addressed the question of whether California's bingo laws fell within the criminal ambit of Public Law 280. *Barona Group of Capitan Grande Band v. Duffy, supra.* In contrast to the facts in *Farris,* in which the particular State gambling statutes involved were directed at conduct (casino-type gambling) which had been found to be contrary to State public policy and therefore fell squarely within the OCCA definition of a "gambling business" in "violation of the law of

[the] state",[21] the court concluded that California's bingo laws were not directed at criminal conduct as intended under Pub.L. 280, but were, for those purposes, civil in nature. Again, the court looked at the nature of the statutes themselves, noting that bingo was available to tax-exempt organizations of diverse kinds (i.e., fraternal societies, recreational clubs, senior citizen organizations, real estate boards and labor and agricultural groups), that there was no general prohibition against the general population's engaging in the act of playing bingo, and that bingo was permitted to be played as a money-making venture. *Id.*, at 1189. The court also noted that even though the statutory scheme was not strictly a licensing or revenue-raising program, *Butterworth* was correct in its observation that "[r]egulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require a ruling that the activity is prohibited." *Id.*, at 1190, fn. 6.

B. The Civil Provisions of Public Law 280

Having established that California's bingo statutes were not criminal within the meaning of Pub.L. 280, the *Barona* and *Cabazon* courts next turned to an analysis of whether the bingo statutes, as civil laws, were enforceable under the civil provisions of Pub.L. 280 (28 U.S.C. § 1360). As in the criminal law context, examination of the Congressional intent of the federal statute against the backdrop of tribal sovereignty was examined, utilizing this Court's analysis in *Bryan v. Itasca County, supra,* for guidance.

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[21] 18 U.S.C. § 1955; *United States v. Farris, supra,* 624 F.2d at 895.

In *Bryan*, this Court found no authority under which a State governed by Pub.L. 280 could impose its regulatory laws upon an Indian reservation. Explicating the language, intent and history of Pub.L. 280, this Court reiterated the "policy of leaving Indians free from State jurisdiction and control [which] is deeply rooted in the Nation's history. . . ." *Id.*, at 376, n. 2. The question addressed was whether the State of Minnesota had the authority to levy a personal property tax on the mobile home of an enrolled member of the Minnesota Chippewa tribe residing on land held in trust by the United States for the benefit of the tribe. This Court unanimously held that neither the defendant County nor State had the authority to levy such a tax in the absence of specific congressional consent, and that references to a State's civil laws in Pub.L. 280 were not a Congressional grant of power enabling the State to exercise its general regulatory powers, *including* taxation, over reservation Indians. *Id.*, at 387, 388.

In reaching that result, the particular language of the civil portions of Pub.L. 280 was examined, paying special attention to Section 4, subsection (a). The primary intent of this provision was found to be to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the state to decide such disputes. . . ." *Id.*, at 383. This court observed that a fair reading of this statutory language suggests

> "that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to

> private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws." *Id.*, at 384, fn. 10, quoting from Israel and Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development,* 94 N.D.L. Rev. 267, 296 (1973).

In analyzing the language of Pub.L. 280, this Court observed "the absence of anything remotely resembling an intention to confer general civil regulatory control over Indian reservations". *Id.*, at 384.

Examining other considerations, including present-day Congressional policy toward reservation Indians, this Court found that Pub.L. 280 "was plainly not meant to effect total assimilation." *Id.*, at 387. The danger of imposing State regulation on a reservation was also described:

> "And nothing in its legislative history remotely suggests that Congess meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States v. Mazurie,* 419 U S 544, 557, 42 L Ed 2d 706, 95 S Ct 710 (1975) — a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments." *Id.*, at 388.

The *Bryan* Court examined other Acts of the same Congress that passed Pub.L. 280, and concluded:

> "[C]onstruing Pub.L. 280 in pari materia with these Acts shows that if Congress in enacting Pub.L. 280 had intended to confer upon the states general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so." *Id.*, at 390.

Appellants and their *amici* are therefore incorrect when they seek to discount the finding of this Court in *Bryan* as *dictum* regarding the power of a state to exercise general civil regulatory control over Indian reservations. Brief of the Appellants, at 9, 35-37. In fact, this Court was following established precedent in examining the Congressional intent behind Pub.L. 280 before determining that the type of State law in question could not have been intended by Congress to be included within either Pub.L. 280's criminal or civil provisions, particularly with respect to the latter if to do so would extend a State's regulatory authority over a reservation in conflict with strong Congressional policy.

Thus, cases decided subsequent to *Bryan*, including *Barona* and *Cabazon*, have continued to turn on this kind of an analysis. Where a State law has been found to be "criminal" under Pub.L. 280, thereby confirming the State's jurisdiction over a reservation for its enforcement, the question of whether it is also "regulatory" simply becomes irrelevant. *See, e.g., United States v. Marcyes, supra; United States v. Farris, supra.* But with respect to those cases decided after *Bryan* which held the State bingo laws under consideration not to be "criminal" within the meaning of Pub.L. 280, the further examination of whether they were within Pub.L. 280's civil provisions simply followed *Bryan* in examining whether their importation onto reservations was the kind of civil jurisdiction envisioned in Pub.L. 280. With respect to bingo

statutes, the cases have uniformly held that such regulation would conflict with *Bryan. Seminole Tribe of Florida v. Butterworth, supra; Barona Group of Capitan Grande Band of Mission Indians v. Duffy, supra; Oneida, supra; Mashentucket Pequot Tribe v. McGuigan*, 13 ILR 3031 (D. Conn. 1986); and *Cabazon, supra.* To have found otherwise would have been to impose on tribes the requirement that they comply with various State regulations which this Court has held would merely relegate the tribe to being little more than a "private, voluntary organization." *Bryan v. Itasca County, supra*, 426 U.S. at 388.

Appellants have argued, however, that this Court's decision subsequent to *Bryan*, in *Rice v. Rehner*, 463 U.S. 713 (1983), now compels a different result. We disagree. *Rice* is entirely consistent with the analysis which has been applied to every case cited, including *Cabazon* and *Barona*. In *Rice*, which did not involve a State subject to Pub.L. 280, the issue was whether a federally licensed Indian trader who was selling liquor on a reservation was subject to State liquor licensing laws. The trader, Rehner, had sought a declaration that under 18 U.S.C. § 1161, a federal statute permitting sales of liquor on reservations provided such sales comply with tribal ordinances and "State law", that term did not include "regulatory" liquor laws of the State such as those compelling the licensing of sellers.

This Court employed the same approach in interpreting § 1161 as courts have traditionally utilized in determining the meaning of other federal laws relating to the possible importation of State jurisdiction over Indian affairs, i.e., to examine the congressional intent involved, utilizing tribal sovereignty as an essential "backdrop against which the applicable treaties and federal statutes must be read" (*McClanahan v. Arizona Tax Commission, supra,*

411 U.S. at 172). After conducting such an analysis, this Court concluded that, unlike Pub.L. 280, the regulatory provisions of a State's liquor laws *were* intended to be included within § 1161; *i.e.*, that there was no historical basis for construing § 1161 as intending to distinguish between or exclude those State liquor laws which are regulatory and those which are not (i.e., those which are "substantive" in nature). *Rice v. Rehner, supra*, 463 U.S. at 734, n. 18. There is nothing in *Rice* to suggest, however, that the basic determination of whether or not a statute is or is not regulatory, as discussed in *Bryan*, has moved beyond the reach of the court. *Rice* simply held that the distinction was not pertinent to its analysis of § 1161. That case therefore neither extends the law nor conflicts with decisions which preceded it in analyzing the wording and history of federal statutes which apply to Indians. Moreover, *Rice* in particular has no special significance to an analysis of Pub.L. 280, since having found that § 1161 applied and therefore invoked the State's jurisdiction, this court properly refused to consider the further applicability of Pub.L. 280. Id., at 717, n.6.

V

CONCLUSION

In *Cabazon*, as in *Barona, Butterworth, Marcyes, Farris*, and *Oneida*, the analysis employed was identical to that followed in *Bryan* and *Rice*. The courts were compelled to determine whether or not a federal statute (in *Cabazon*, Pub.L. 280), in light of the backdrop of tribal sovereignty as well as other traditional considerations of Congressional intent, was meant to cover bingo statutory schemes which were only facially criminal and, if merely civil instead, potentially conflicted with Congress' policy of Tribal sovereignty. Given the kind of innocuous conduct

in question and the findings by all federal courts which have considered the impact on, and interference with, legitimate tribal activities and self-government which imposition of these State regulatory schemes were found to have, these courts correctly determined, consistent with *Bryan* and *Rice*, that the State bingo laws in issue were not the kinds of statutes intended to be included within the meaning of either the civil or criminal provisions of Pub.L. 280. That conclusion in no way removes or even affects those law enforcement tools which may be necessary to prevent the commission of the kinds of crime feared by appellants. We respectfully submit it is to those potential crimes, *not* the playing of bingo, to which their attention should be directed. We respectfully request that the *Cabazon* decision be affirmed.

DATED: September 22, 1986

Respectfully submitted,

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NON-COMMISSIONED OFFICERS' OPEN MESS

NORTON AIR FORCE BASE, CALIFORNIA 92409

BINGO PROGRAM

GAME	TYPE	PRIZE
1	BONANZA BINGO - COVERALL IN 48 NUMBERS	$2,500 Savings Bond
2	SPEEDY- STRAIGHT BINGO (6 Games), NO CORNER BINGOS -CALLED FAST	80% of Sales
3	YELLOW SPECIAL - DOUBLE BINGO (NO CORNERS)	75% of Sales
4	HARD CARDS - STRAIGHT BINGO	$50.00
5	HARD CARDS - STRAIGHT BINGO CORNERS COUNT	$50.00
6	HARD CARDS - SIX PACK BINGO	$50.00
7	HARD CARDS - SMALL PICTURE	$50.00
8	GREEN SPECIAL - LUCKY "7"	70% of Sales
9	BLUE SPECIAL - LETTER "X"	70% of Sales
INTERMISSION	INTERMISSION	INTERMISSION
	DOOR PRIZE DRAWINGS AFTER INTERMISSION EACH WEEK	
10	RED SPECIAL - CRAZY T - 50¢ each	70% of Sales
11	BROWN SPECIAL - CRAZY L - 50¢ each	70% of Sales
12	HARD CARDS - STRAIGHT BINGO	$50.00
13	HARD CARDS - CRAZY BINGO- STRAIGHT BINGO CORNERS COUNT	$50.00
14	CONTINUE FOR LETTER X	$50.00
15	CONTINUE FOR LARGE PICTURE FRAME	$50.00
16	CONTINUE FOR COVERALL BINGO	$75.00 to $250.00
17	ORANGE SPECIAL - BLOCK OF NINE	70% of Sales
18	PURPLE SPECIAL - JACKPOT BINGO _____ #s OR LESS PROGRESSIVE EACH WEEK _____ #s OR LESS CONSOLATION PRIZE NOTE: When $1000. Jackpot is won, $1000 goes to 50 #s. and $500. is back to 54 #s	$1000.00 $500.00 $150.00 to $250.00
19	WINNER TAKE ALL SPECIAL (OLIVE SPECIAL) 50¢ each	100 % of take

NOTE: In the event the NCO Club is used for a special function on Tuesday night Bingo will be held at the Galaxy Recreation Center!

NON-COMMISSIONED OFFICERS' OPEN MESS

NORTON AIR FORCE BASE, CALIFORNIA 92409

BINGO RULES

1. BINGO CARDS WILL GO ON SALE AT 1730 HOURS.

2. PAPER CARDS WILL SELL FOR THE PRICE STATED FOR THAT PARTICULAR GAME.

3. YOU MUST HAVE THE LAST NUMBER CALLED WITHIN THE GAME PLAYED TO WIN.

4. NO WINNER RECOGNIZED AFTER A GAME IS CLOSED.

5. SPECIAL CARDS MAY NOT BE TORN APART. USE INK MARKERS ONLY.

6. IN THE EVENT OF TIES, THE AMOUNT WILL BE EQUALLY DIVIDED AMONG ALL WINNERS.

7. PARTICIPANTS MUST BE BONAFIED MEMBERS IN GOOD STANDING. YOUR CLUB CARD MUST BE STAMPED CURRENT. YOU MAY NOT HAVE YOUR CARD UPDATED AFTER WINNING IN ORDER TO COLLECT PRIZE.

8. ALL GUESTS MUST BE SIGNED IN. PERSONS ELIGIBLE FOR MEMBERSHIP IN THE CLUB MAY NOT BE SIGNED IN AS GUESTS.

9. WINNERS OF GAMES WITH PRIZES OF MORE THAN $150.00 MAY COLLECT THEIR CHECKS AT THE NCO CLUB OFFICE ON FRIDAY AFTER 1500 HOURS.

10. MINIMUM PURCHASE OF 3 HARD BOARDS @ $2.50 IS REQUIRED TO PLAY ANY BINGO GAMES.

11. TICKETS MUST BE PRESENT ON THE TABLE WITH YOUR CARDS, OTHERWISE YOUR BINGO CANNOT BE HONORED.

12. CARD PRICES: HARD BOARDS, MINIMUM PURCHASE OF 3 @ $2.50

SPECIAL PACKAGES: 8 HARD BOARDS, 7 SPECIAL & 1 SET SPEEDY $10.50

15 HARD BOARDS, 7 SPECIALS & 1 SET SPEEDY $11.50

AFTER PURCHASE OF 15 HARD CARDS, CARDS ARE 3 FOR $1.00

13. YOU MUST BE 18 YEARS OF AGE TO PLAY BINGO.

14. BINGO CALLER RESERVES THE RIGHT TO CHANGE ANY GAME.

15. IN ORDER TO HOLD A SEAT, IT MUST BE PURCHASED WITH A MINIMUM BUY-IN TICKET OF $2.50. NO EXCEPTIONS.

AUG 86' — GALAXY RECREATION CENTER NORTON AFB, CA.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
AEROBIC/ EXERCISE MORALE, WELFARE AND RECREATION			JOIN the FUN!	Information TICKETS & TOURS MAC	DISCO With SANDY FOUTCH	2 DISCO TOUR BEVERLY HILLS QUEEN MARY
KEN BARRY'S 3 MUSIC WORKSHOP 7-10	CO-ED 4 Aerobics MON-THU FRI 6-8	DOG OBEDIENCE 5 6-8 TANG-SOO-DO 6-8	NOONTIME 6 Aerobics MON-WED-FRI 11:30 - 1230	BINGO 7 6:45 TANG-SOO-DO 6-8	DISCO 8 MATT N JACK	DISCO 9
Summer Savings 10 BUY YOUR DISCOUNT TICKETS $	TRY OUR 11 SNACK BAR	DOG OBEDIENCE 12 6-8 TANG-SOO-DO 6-8	MAKE YOUR RESERVATIONS EARLY FOR LAKE ISABELLA	BINGO 14 TANG-SOO-DO	TOUR LAS VEGAS 15 9-1 DISCO JUMPIN SONNY	TOUR 16 L.A. DELUXE DISCO 9-1
KEN BARRY'S 17 MUSIC WORKSHOP 7-10	CHECKERS 18 tournament 6:30	DOG OBEDIENCE 19 6-8 TANG-SOO-DO 6-8	BIRTHDAY PARTY 20 for LEO & VIRGO'S	BINGO 21 6:45 TANG-SOO-DO 6-8	DISCO 22 9-1 WITH SANDY FOUTCH	DISCO 23 9-1
TOUR / OFFICE 29 31	TAKES YOU PLACES! 25	DOG OBEDIENCE 26 6-8 TABLE TENNIS 6 PM OPEN MIKE TALENT NIGHT 8 PM	POOL 27 tournament 6 PM	BINGO 28 6:45 TANG-SOO-DO 6-8	DISCO 29 9-1 JUMPIN SONNY	DISCO 30 9-1

AUG 85' — YOUTH CENTER ACTIVITIES — NORTON AFB, CA.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
YOUTH CENTER CLOSED ON SUNDAYS	**TUTORING** Classes MON - WED - FRI ~ 10 am				1 PEE WEE KARATE EVERY FRI - 5PM TEEN & ADULT KARATE TEEN SPLASH PARTY & FAMILY POOL 7:30 PM	2 YOUTH CENTER OPEN 9AM - 3PM GYMNASTICS LESSONS EVERY SATURDAY 11:30 - ADVANCE 1:00 - BEGINNER
3 CENTER CLOSED	4 PEE WEE KARATE EVERY MONDAY 5 TEEN & ADULT KARATE EVERY MONDAY 6PM DAY CAMPERS AND TEEN VOLLEYBALL - 2PM	5 SPECIAL TREAT DAY ICE CREAM TEEN BINGO - 10 AM TEEN [illegible] - 2PM	6 PEE WEE KARATE EVERY WED - 5PM TEEN & ADULT KARATE EVERY WED - 6PM TEEN MOVIE DAY DAY CAMPERS TRIP - 9AM [illegible]	7 LIFE SKILL DAYS TEEN CERAMICS 10 AM TEEN TRIP 7-10 TO GRAND CANYON	8 TEEN DANCE 8-11PM TEEN BASKETBALL 2 PM GRAND CANYON AUG. 7-10	9 PIANO LESSONS EVERY SATURDAY BY APPOINTMENT
10 ON SUNDAYS FREE FREE FREE CLINICS	11 GYMNASTICS EVERY MONDAY 2:30PM DAY CAMPERS MOVIE DAY TEEN VOLLEYBALL 2 PM	12 LOLLIPOPS TEEN BINGO - 10 AM TEEN CRAFTS - 2PM	13 TRACK MEET 10:30 AM TEEN MOVIE DAY GYMNASTICS EVERY WED 1:30 PM	14 LIFE SKILL DAYS DAY CAMPERS TRIP TO SANTA'S VILLAGE TEEN CERAMICS - 10 AM	15 REGISTRATION DAY FOR FALL ACTIVITIES 2 PM - 5PM TEEN BEACH & BAR-B-QUE PARTY - 1PM TEEN BASKETBALL - 2PM	16 TEEN HIKE TO CYCLE CREEK YOUTH BOWLING LEAGUE BEGINS - 15 SEP
17 Challenge of the Seas ALL DAY DAY CAMPERS MOVIE DAY TEEN VOLLEYBALL 2 PM	18 SPECIAL TREAT DAY COOKIES TEEN BINGO - 10 AM TEEN [illegible] - 2PM	19 SWIM MEET 3PM TEEN MOVIE DAY SUMMER FUN ALL WEEK	20 LIFE SKILL DAYS TEEN CERAMICS 10 AM	21 TEEN TRIP MAGIC MT. - 10 AM - 10 PM TEEN BASKETBALL 2 PM KIDS FLEA MARKET 10AM - 11AM	22 COMING !! BOWLING SCHOOL FOR NEW BOWLERS at 9:30 AM	23
24 GOLF CLINIC 10 AM BASKETBALL CLINIC 2 PM	25 TEEN VOLLYBALL 2 PM DAY CAMPERS MOVIE DAY	26 SPECIAL TREAT DAY LOLLIPOPS TEEN CRAFTS - 2PM TEEN BINGO 10 AM	27 TEEN MOVIE DAY [illegible] FOOTBALL WEEK	28 LIFE SKILL DAYS	29 TEEN BEACH & BAR-B-QUE 1 PM DAY CAMPERS GRADUATION NOON [illegible] AND MARIONETTES NOON	30 YOUTH CENTER 12 HOUR LABOR DAY PARTY NOON - MIDNITE

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 22, 1986, I served the within Brief of the San Manuel Band of Mission Indians as Amicus Curiae in Support of Appellees in re: "State of California vs Cabazon Band of Mission Indians" in the United States Supreme Court, October Term 1985, No. 85-1708;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 22, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

No. 85-1708

Supreme Court, U.S.
FILED
SEP 24 1986
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees.

On Appeal from
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, AND THE PUEBLO OF SAN JUAN IN SUPPORT OF THE POSITION OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1708

STATE OF CALIFORNIA, *et al.*,

Appellants,

VS.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees.

On Appeal from
the United States Court of Appeals
for the Ninth Circuit

MOTION OF THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, AND THE PUEBLO OF SAN JUAN FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, and THE PUEBLO OF SAN JUAN hereby respectfully move the Court for leave to file the attached Brief *Amici Curiae* in the above-entitled cause. The written consent of the attorneys for Appellees, The CABAZON BAND OF MISSION INDIANS and the MORONGO BAND OF MISSION INDIANS, and the attorneys

for Appellants, THE STATE OF CALIFORNIA, et al., have been obtained.

THE PUEBLOS OF SANDIA, ACOMA, TESUQUE, and SAN JUAN ("AMICI INDIAN PUEBLOS") have a substantial interest in this case, which interest is more fully set forth in the attached Brief in Support of the Appellees' Position, because

1. AMICI INDIAN PUEBLOS are federally-recognized Pueblo Indian tribes located within the exterior boundaries of the State of New Mexico.

2. AMICI INDIAN PUEBLOS have bingo operations within the exterior boundaries of their reservations located within the State of New Mexico.

3. The decision in the captioned cause may be determinative of the operations of the bingos located within the exterior boundaries of AMICI INDIAN PUEBLOS. If the decision below is reversed, the ability of the AMICI INDIAN PUEBLOS effectively to deal with and control their bingo operations may be significantly altered in that such reversal may have the effect of directly impacting the successful economic benefits that have accrued from the operation of bingos, upon which bingo operations the AMICI INDIAN PUEBLOS have relied for financial and economic livelihood.

4. The issues raised in this cause and discussed in the attached Brief *Amici Curiae* may have a direct and immediate impact on the AMICI INDIAN PUEBLOS.

For the reasons set forth herein the AMICI INDIAN PUEBLOS request that their Motion for Leave to File the accompanying Brief *Amici Curiae* be granted.

Respectfully submitted,

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QUESTION PRESENTED

Can a State law and local ordinance regulating the operation of bingo games be applied to prevent Federally-recognized Indian tribal governments from conducting bingo games on their reservations, where such games are sanctioned by the U.S. Department of Interior and provide the main source of revenue and employment for the tribes?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1708

STATE OF CALIFORNIA, *et al.*,

Appellants,

VS.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees.

On Appeal from
the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE POSITION OF APPELLEES

The *amici curiae*, THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, and THE PUEBLO OF SAN JUAN (hereinafter "AMICI INDIAN PUEBLOS"), respectfully request that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit, declaring that a State and County cannot apply their regulatory laws on the Appellees' Indian reservations and leaving intact the mandates of tribal sovereignty inherent in the Federal policy of tribal self-determination. Appellants and Appellees have consented in

writing to the filing of this brief in support of Appellees.

INTEREST OF THE *AMICI CURIAE*

The AMICI INDIAN PUEBLOS are individual Federally-recognized Indian tribes located within the State of New Mexico and have on-going bingo operations on their respective reservations, with the approval and assistance of the Secretary of Interior.

The decision below correctly held that a State and County may not apply their regulatory laws to Indian tribes operating on their reservations; if this decision is reversed and States and Counties are permitted so to apply their regulatory laws, it will undermine the right of tribes to make their own laws, contravene Federal interests in Indian affairs, destroy tribes' capacity to generate revenue for tribal activities and to provide employment for tribal members; open the door to State and County control over tribal commercial enterprises; and violate constitutional protections afforded Indian tribes.

SUMMARY OF ARGUMENT

The doctrine of Federal pre-emption prohibits the application of State and local laws from interfering with Indian bingo enterprises. Federal pre-emption is based on a national policy mandating Indian economic self-sufficiency, and is further manifested by an overwhelming Federal presence by way of a specific constitutional provision, statutes, regulatory schemes, and actions of the Federal government. The application of State and local laws to Indian bingo would impermissibly infringe on the right of Indians to make their own laws and be ruled by them. An affirmance

of the analysis in the court decision below is necessary so that a consistent application of P.L. 83-280 can be made as to tribes located in all States.

ARGUMENT

I. ENFORCEMENT OF STATE LAWS REGULATING INDIAN BINGO IS PRE-EMPTED BY FEDERAL LAW.

State laws are invalidated by the exercise of a substantive constitutional power implemented by the Supremacy Clause of the Constitution which declares treaties and Federal statutes to be "the supreme law of the land . . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2. Under the doctrine of pre-emption, Federal involvement in a field precludes State action in the same field. *Perez v. Campbell*, 402 U.S. 637 (1971); *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). This Court has ruled that State law must defer to Federal actions where any of the following three elements exists: (1) the scheme of Federal legislation is so complete and pervasive that no room is left for the State to supplement it; (2) the Federal interest is so dominant that State laws in the same subject must yield; or (3) the enforcement of the State statute presents a substantial conflict with the administration of the Federal program. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *reh. denied*, 351 U.S. 934 (1956). The underlying rationale of the pre-emption doctrine is simply that the Supremacy Clause of the Constitution invalidates State laws that interfere with or are contrary to Federal action. Furthermore, Federal pre-emption is not limited by the

absence of an explicit statement of pre-emption. State authority will be displaced if the intent to pre-empt is implicit in Federal action as would be contained in a Federal statute of structure and purpose. Such intent may be inferred when Federal superintendence of the field and the Federal interest are so dominant that the Federal system will be assumed to preclude enforcement of any State laws on the same subject. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). When the exercise of State power frustrates or obstructs the objectives of legitimate national policy or State action stands as an obstacle to the accomplishment of the full purposes and objectives of a Congressional act, then it is clear that State actions are pre-empted by national policy. *Chicago & Northwestern Transportation Co., supra*; *San Diego Unified Port District v. Gianturco, supra.*

Indian affairs occupy a unique and significant place in the application of the doctrine of pre-emption. The Supreme Court has consistently followed the principle that the constitutional scheme, which includes Indian treaties, executive orders, and statutes, delegates paramount authority over Indian affairs to the Federal government. A singularly important factor in limiting State power over Indians is tribal sovereignty under the protection of Federal law. The Indian pre-emption decisions are highly protective of tribal self-government in Indian country and allow minimal application of State law. In Indian country, the application of State law is antithetical to tribal sovereignty, absent a specific Federal statute making that accommodation. *Cohen's Handbook of Federal Indian Law*, 1982 Ed., p. 270. Although the absolute barrier to State

jurisdiction in Indian country found in the case of *Worcester v. Georgia*, 31 U.S. 515 (1832), has been modified over the years toward some concurrent jurisdiction between the States and the Federal government, the Supreme Court and other Federal Courts have consistently stated that, generally, State laws do not apply to Indian country except when Congress has expressly provided that State law shall apply. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). The unique historical origins of tribal sovereignty and the right to tribal self-government are pervasive in Indian pre-emption cases and are the foundation for State exclusion.

Under the Indian Commerce Clause, Art. I, Section 8, cl. 3, Congress has broad power to regulate Indian Affairs. *United States v. Wheeler*, 435 U.S. 313 (1978). In recent times, this Congressional authority and the unique legal position of Indian tribes have given rise to a particular judicial analysis for deciding pre-emption questions. The courts have established "two independent but related barriers to the assertion of State regulatory authority over tribal reservations and members." First, the exercise of such State authority may actually be pre-empted by the existence of a Federal law or Federal regulatory scheme covering the topic in question. Second, the State regulation may unlawfully infringe on the right of reservation Indians to make their own laws and to be ruled by them. *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Williams v. Lee*, 358 U.S. 217 (1959). Either of these barriers standing alone is sufficient to prevent a State law or State action from interfering in

activities undertaken on reservations or by tribes. Pursuant to these standards by which the validity of State action is judged, the courts have included in their pre-emption analysis two significant considerations. One is the traditional and historical basis of tribal sovereignty, and the other is the recognition and encouragement of that sovereignty in Congressional acts which promote tribal independence and economic development. As discussed below, application of the State's laws to the conduct of tribal bingo operations on the reservation are pre-empted under both of the above-described barriers, that is, under the Federal regulatory scheme promoting Indian economic independence, and the inherent Indian right of self-government.

II. STATE JURISDICTION OVER INDIAN BINGO ACTIVITIES IS PRE-EMPTED BY FEDERAL NATIONAL POLICY, FEDERAL STATUTE, FEDERAL REGULATIONS, AND CONGRESSIONAL ACTION.

A. Tribal economic self-sufficiency and economic development are actively encouraged and supported by our national Federal policy.

It is clear that, in determining the nature and extent of national policy, courts look far beyond express language of Congressional acts; they also look to the implication and operation of Federal regulations and policies. *Ramah, supra; White Mountain Apache, supra.* A central issue in this case is the role of the Federal government in actively supporting and promoting Indian activities which contribute to economic self-sufficiency and development. Indian bingo is a vital means by which economic independence is achieved. Indian bingo enterprises create jobs for

tribal members and provide a source of revenue for operating tribal governments. Federal Indian policy is to encourage and foster economic development on the reservation itself. Indeed, this Court has specifically recognized the firm Federal commitment to tribal economic independence. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 322 (1983); *White Mountain Apache*, *supra*. The Federal government has clearly indicated through Congressional, executive, and administrative actions that Indian economic self-sufficiency, attained in large measure through the establishment of revenue-generating tribal enterprises, such as bingo, on the reservation itself, occupies a paramount position in our current national policy.

The staunch commitment to improve economic conditions on reservations has been a Federal policy for a substantial time. President Richard Nixon, in 1970, stated, ". . . it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure."[1]

Congress has repeatedly expressed the national policy of promoting Indian economic development on reservations. Among the legislation is the Indian

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[1] Immediately preceding this conclusion, the President commented as follows:

> Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as eighty percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500.

(President of the United States, Recommendations for Indian Policy, H.R.Doc. No. 363, 91st Cong. 2d Sess. 7 (1970).

Financing Act of 1974, 25 U.S.C. 1451-1543, which provides Federal funds for such development.[2] Congress has continued to reauthorize and fund this Act, *e.g.*, 25 U.S.C. 1451, *et seq.* Also in 1974 Congress passed the Native American Programs Act of 1974, 42 U.S.C. 2991, *et seq.*, to fund the operation of Indian programs to pursue similar objectives.[3]

The Federal government's long-standing commitment to stimulating economic development and growth and to increasing tribal business enterprises on the reservation was recently expressed in the current Administration by President Ronald Reagan. In a January 24, 1983, Presidential Statement on Indian Policy, President Reagan states,

> It is important to the concept of self-government that tribes reduce their dependence

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[2] In the legislative history of this Act, it is stated:

> One of the most serious problems on the Indian reservations is the inadequate availability of financial resources to permit the Indian people to develop their own resources and potential. All the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today, there is almost a total lack of economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be provided or facilitated.

1974 U.S. Code Cong. & Ad. News, p. 2874.

[3] This Act specifically states that its purpose is to "increase the economic and social service self-sufficiency of the Indian people. This is in line with the whole concept of self-determination which has as its main function to build the capacity of tribal governments and off-reservation Indians to make decisions and to manage programs which affect their social and economic conditions."

> on Federal funds by providing a greater percentage of the cost of their self-government. . . . The economies of American Indian reservations are extremely depressed, with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their Number 1 priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. . . . Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed.[4]

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[4] The complete text of the portion of the President's statement from which these comments were extracted states:

> It is important to the concept of self-government that tribes reduce setheir dependence on Federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the Federal impediments to tribal self-government and tribal resource development. Necessary Federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.
>
> Without sound reservation economies, the concept of self-government has little meaning. . . . This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the Federal government, and the private sector in developing reservation economies.
>
> The economies of American Indian reservations are extremely depressed, with unemployment rates among the

Recent expressions of the national policy of commitment to development of reservation commercial enterprises state that "actions are needed to create a positive environment for the development and growth of reservation economies." Exec. Order No. 12401, 48 Fed. Reg. 2309 (1983) (President Reagan establishing the Presidential Commission on Indian Reservation Economies). It is indisputable that the achievement of increased Indian economic independence and self-sufficiency through the establishment of Indian-owned and managed, revenue-generating enterprises such as bingo is and has been a major goal of our Federal Indian policy. In order affirmatively to facilitate the attainment of this goal, the Secretary of Interior has issued a plethora of regulations and procedures to establish and implement programs to "stimulate and increase Indian entrepreneurship and employment through establishment, acquisition, or expansion of profit-making, Indian-owned economic enterprises which will contribute to the economy of a reservation." For example, the Secretary of Interior administers a program specifically to make loans to Indians for economic enterprises operated for profit on reservations (25 CFR Chapter 1, Section 101.1, *et seq.*); a program for special grants for tribal facilities

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highest in the country. Indian leaders have told this Administration that the development of reservation economies is their Number 1 priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. . . . Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed.

or reservation resources for the purpose of profit (25 CFR Section 278.1, *et seq.*); and a program for guaranteed loans and interest subsidies for economic enterprises contributing to the economies of Indian reservations (25 CFR Section 103.1, *et seq.*). Substantial and direct financial assistance has been made to Indian bingos.[5]

The above discussion makes it abundantly clear that every branch of the Federal government—the executive, the legislative, and the administrative—actively and aggressively supports, promotes, and assists in establishing economic enterprises such as Indian bingo for the purpose of generating funds to be used for legitimate and vital tribal services. Such an unquestioned, comprehensive, and long-standing commitment inherent in our Federal national policy pre-emptively obviates State assertion of control over bingo operations on Indian land.

B. The operation of bingo enterprises by the AMICI INDIAN PUEBLOS is exemplary in furthering the mandates of the Federal policy of Indian economic self-sufficiency.

For the AMICI INDIAN PUEBLOS the profits from bingo operations have provided immense economic benefits to tribes and tribal members. The revenues generated from bingo have allowed the tribes

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[5] Among the grants made by the Department of Interior toward tribal bingo operations are (1) a grant in the amount of $125,000 to Sisseton-Wahpeton Tribe in South Dakota; (2) a grant in the amount of $477,000 to Bois Forte Tribe on the Nett Lake Reservation in Minnesota; (3) a grant of $500,000 to Pequot Tribe in Connecticut; and (4) a grant of $100,000 to Stockbridge-Munsee Tribe in Wisconsin. Records of Bureau of Indian Affairs, Central Office, Division of Financial Assistance.

to create jobs for their members, thus reducing unemployment on their reservations; to increase the standard of living on the reservations; to fund tribal government and public projects to provide services to their members; and to contribute to charitable organizations. (Turning to bingo is historically consistent; games of chance have been a part of Pueblo traditional practices since ancient times.) Indeed, the Federal judiciary has sent a clear and unequivocal message to Indian country that bingo is a legitimate source of increasing tribal revenue on the reservation that is beyond State jurisdiction. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). Through bingo revenues, AMICI INDIAN PUEBLOS have been successful in providing services for tribes and tribal members. Except for bingo revenues, these funds simply would not be available. Further explication of the experiences of the AMICI INDIAN PUEBLOS follows.

1. PUEBLO OF SANDIA

The Pueblo of Sandia's on-reservation bingo enterprise has been in operation since January, 1984. As of August 26, 1986, bingo has generated an enterprise equity of $839,687. These monies have been utilized to fund tribal government operations and to support numerous public projects for the benefit of the tribal members. These profits have allowed contributions to worthwhile charitable organizations and have provided

the necessary capital to allow the Pueblo to initiate other tribal enterprises.[6] Furthermore, the bingo operation has significantly reduced unemployment on the reservation during the past two and one-half years from approximately 12% to 3%.[7] Moreover, the bingo building was financed through a Bureau of Indian Affairs direct loan, and the paved road leading to the bingo building was constructed by the Bureau of Indian Affairs, exemplifying Federal involvement with Indian bingo.

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[6] Through August 1986, bingo profits constituted approximately 50% of tribal revenues. Throughout the past three years bingo revenues have helped in paying tribal salaries and associated employee expenses; provided funds for repairs and maintenance on community facilities including water and sewer, tribal buildings, swimming pool, tribal vehicles, and heavy equipment; provided funds for professional and legal services; enabled the purchase of computer equipment, office, and heavy construction equipment; and further provided the opportunity for the Pueblo to operate a volunteer fire department and to secure BIA loans for commercial buildings. Local and national charitable foundations have been the recipient of Indian bingo "charity nights" where the bingo enterprise has generously sponsored winnings to be earmarked for charitable groups. See Appendix 1, letter from Governor of Pueblo of Sandia dated August 26, 1986.

[7] Sandia Indian Bingo also employs non-tribal and non-Indian individuals, paying $2,408,521 in salaries and wages. 36 tribal members employed at the bingo enterprise represent 29% of Sandia's labor force as of February 1985, and over half of the employees are non-Indians from the greater metropolitan Albuquerque area. The Pueblo has also purchased $2,880,289 in goods and services, primarily in the surrounding Albuquerque area. Tribal members employed by the Bingo are gaining business experience at every level of the operation. See Appendix 1, letter from the Governor of the Pueblo of Sandia, dated August 26, 1986.

2. PUEBLO OF SAN JUAN.

The Pueblo of San Juan has also enjoyed economic benefits from its bingo enterprise. To date the Pueblo has earned $75,662, which is used for tribal operations, as well as for community and government services.[8] Since its inception San Juan bingo has sharply reduced tribal unemployment and presently has an employment ratio of twenty-eight Indians to one non-Indian. The San Juan bingo operation also assists with fundraising activities for non-profit and charitable organizations.[9]

3. PUEBLO OF TESUQUE.

The Pueblo of Tesuque's bingo enterprise has been in operation since January 2, 1985. In its first year of operation it generated an enterprise equity of over $18,000.00, which funds were utilized in tribal government operations and for the public benefit of tribal members. The bingo operation employs twenty-eight tribal members and has significantly reduced unemployment among tribal members.[10]

4. PUEBLO OF ACOMA.

The Pueblo of Acoma initiated the first Indian bingo in New Mexico. It began operations in 1983 and has

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[8] The funds paid monthly to the Pueblo are determined by the profits earned for that particular month. Revenue generated from bingo activity is to be used specifically for community and government services. See Appendix 2, letter from the Governor of San Juan Pueblo.

[9] Over the period of its operation, San Juan bingo has assisted such organizations as the Santa Fe Indian School and the San Juan Pueblo Parish with fundraising activities. See Appendix 2, letter from the Governor of San Juan Pueblo.

[10] See Appendix 3, letter from the Governor of the Pueblo of Tesuque.

to date generated $387,000.00 as enterprise equity, which has been utilized for tribal programs, such as a child care center, funds for education, hot lunch program, provisions for flood victims, alcoholism programs, and elderly care programs. Further, the funds have aided in financing other tribal commercial ventures. Thirty-five tribal members are employed in the bingo operation directly, and ten more indirectly, such as in the food concession. The building which houses the bingo operation was funded by the Federal government through the Economic Development Act. As in other bingo operations, funds are provided to local charities, Indian and non-Indian alike.[11]

It is indisputable that the AMICI INDIAN PUEBLOS' bingo operations have greatly fostered the growth of the economies of the tribes, reducing unemployment and increasing revenues for tribal government operations and public tribal projects. (The benefits to non-Indian economies and to charitable organizations is incidental but noteworthy). It is manifestly clear that Indian bingo is successfully fulfilling the mandates of the Federal policy promoting Indian economic self-sufficiency. Moreover, the inextricable Federal involvement in Indian bingo, including the contribution of Federal dollars, is undeniable.

C. Consistent with national policy, bingo is a Federally-approved and comprehensively regulated business enterprise.

Even under the classic pre-emption tests, State regulation of Indian bingo is pre-empted by Federal law. As stated in *Chicago and Northwestern Transporta-*

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[11] See Appendix 4, letter from business manager of Acoma Development Authority.

tion, supra, a State statute must yield when it "stands as an obstacle to the accomplishment . . . of the full purposes" of a Federal action. 450 U.S. at 317. In *Ramah, supra*, the Court found that the Federal regulatory scheme covering the construction of Indian schools on reservation lands provided sufficient direction and supervision so as to pre-empt the State's authority to impose a tax.

Indian bingo is subject to a comprehensive regulatory scheme which clearly pre-empts any control over Indian bingo by States. Federal involvement derives partly from 25 U.S.C. 81, which relates to contracts with Indian tribes. In the case of *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), the Court of Appeals considered the dual question of whether bingo management agreements were agreements relative to Indian lands and, if so, whether Section 81 required that such agreements, in order to be valid, be approved by the Secretary of Interior. The Court held that, since the agreement involved the right to operate, maintain, and control the bingo facility on tribal trust lands, it was "relative to Indian land," that Section 81 applied, and that Secretarial approval was a condition precedent to the validity of the agreement. Similarly, in *United States, ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company*, 616 F.Supp. 1200 (D.C. Minn. 1985), the Court ruled that Section 81 applied to bingo agreements, making Secretarial approval necessary, and subjected the same to judicial review.

The Secretary of Interior, using his clear legal authority to approve or disapprove bingo agreements (and doubtless, by the impetus of the *Winnebago* and

Shakopee cases), has promulgated thorough and extensive guidelines for the review of bingo agreements. The first guidelines were issued on July 20, 1984, a supplement on April 9, 1985, and the current directive on April 7, 1986. *See* Appendix 5. These directives, it should be noted, are not limited to matters within the four corners of a bingo agreement but to a variety of other issues as well, such as the good character and reputation of any parties involved in Indian bingo operations. Thus, it is manifestly clear that not only is Indian bingo a business enterprise that is authorized by Federal law and judicial decision, but also it is one in which the Federal government is directly and actively involved. Indian bingo is carried on by Indians on Indian land for the purpose of generating revenues and profits to be utilized for essential tribal programs and services, a use that is squarely in keeping with our national policy of Indian self-sufficiency and economic independence.

That Congress regards Indian bingo as a national policy question is demonstrated in H.R. 1920, the Indian Gaming Regulatory Act, passed by the House of Representatives on April 21, 1986. A Congressional finding was specifically made on that point.[12] Com-

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[12] Section 2(a) of the Act states the following:

The Congress finds that

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; . . . .

(5) a principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and

ments by Congressmen emphasize the national nature of Indian bingo.[13] Whether H.R. 1920 or another bill becomes law, it is clear that Congress regards the matter of Indian bingo and Indian economic self-sufficiency as a national question. Under any pre-emption analysis, there is no question that a State is pre-empted from regulating Indian bingo over which the Federal government has vigorously exercised its regulatory authority. State laws simply do not apply over tribal matters unless Congress says so, *McClanahan*,

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strong tribal government; and

(6) tribal operation and licensing of gaming activities is a legitimate means of generating revenues.

[13] In floor discussion regarding H.R. 1920, on April 21, 1986, The Honorable Morris Udall, the Representative from Arizona, made the following observations:

> . . . for some tribes gaming enterprises has become an important source of tribal revenue. These commercial enterprises have provided employment for the Indian people. In some cases tribal unemployment has been reduced from fifty percent or more, to less then ten percent. Tribes are using revenue from gaming for health clinics, roads, scholarships, and numerous other economic and governmental and social efforts.

(132 Cong. Rec. No. 50 (1986) at p. 2016).

Similarly, the Honorable Bill Richardson, the Representative from New Mexico, stated,

> . . . As Federal resources are declining, Indian tribes are searching for ways to replace Federal sources of funding in order to meet their needs. In New Mexico, the Sandia, Acoma, and Tesuque Pueblos have turned to bingo as a source of tribal revenue to support their tribal governments and tribal programs.

(132 Cong. Rec. No. 50 (1986), at pp. 2016-2017).

supra; indeed, here Congress has stated quite to the contrary.

III. STATE LAWS REGULATING BINGO OPERATIONS ARE PRE-EMPTED INSOFAR AS THEY IMPERMISSIBLY INFRINGE ON THE INHERENT RIGHT OF TRIBAL SELF-GOVERNMENT.

A. The tribes' control of their own bingo operations is pursuant to their right to govern their internal affairs.

The cornerstone of the Indian pre-emption decisions is the affirmation of tribal sovereignty. This Court has consistently stressed that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *New Mexico v. Mescalero*, *supra*; *White Mountain Apache*, *supra*. Because of their sovereign status, tribes and their reservation lands are insulated by historic immunity from State and local control. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). The tribes retain any aspect of their historic sovereignty not "inconsistent with the overriding interests of the national government." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The sovereignty retained by the tribes includes the power of regulating their internal and social relations. *United States v. Wheeler*, *supra*; *New Mexico v. Mescalero*, *supra*. In the *New Mexico v. Mescalero* case, the Court reaffirmed the tribal right of self-government, saying, "a State may not act in a manner that infringes on the right of reservation Indians to make their own laws and be ruled by them." 462 U.S. at 332. In this case, the tribe had a program to develop and manage the reservation's wildlife and land resources to generate funds and provide employment for members. When the State at-

tempted to assert concurrent jurisdiction by enforcing its game laws against non-Indians for acts done on the reservation, the Court held that such State interference was not permissible, saying,

> We have stressed that Congress's objective of furthering tribal self-government . . . includes Congress's overriding goal of encouraging tribal self-sufficiency and economic development. . . . [W]e have held that tribes have the power to manage the use of their territory and resources by both members and non-members, to undertake and regulate economic activity within the reservation. (*Citing White Mountain Apache, supra*; *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982); *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245 (1981); 18 U.S.C. 1162(B); 25 U.S.C. 1321(B) and 1322(B).)

The rationale in the *New Mexico v. Mescalero* case squares exactly with the essential facts and circumstances of Indian bingo.

The Court further noted that the assertion of concurrent jurisdiction by the State would not only threaten to disrupt the Federal and tribal regulatory scheme but also would threaten Congress's overriding objective of encouraging tribal self-government and economic development, plainly standing as an obstacle to the accomplishment of the full purposes and objectives of Congress. Interference with tribal self-government through the application of the State's laws regulating Indian bingo on Indian land directly contravenes constitutional and federal policies and regulations to promote Indian sovereignty and to foster

economic development on the reservation. The plenary power of Congress over tribal sovereignty precludes such interference by the States since the broad power to regulate tribal affairs under the Indian Commerce Clause rests with Congress, not the States. Even though the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress, the traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important "backdrop" against which enactments must always be measured. *White Mountain Apache Tribe*, *supra*. Since Congress has exercised its power to enhance and promote tribal sovereignty, self-government, and economic development on the reservation by sanctioning and regulating Indian bingo, the State is pre-empted from applying its own regulatory scheme.

B. Even if the State had a legitimate interest in regulating Indian bingo, it is outweighed by Federal and tribal interests in promoting Indian economic development and self-government.

In the *White Mountain Apache* case, *supra*, the Court ruled that "When on-reservation conduct involving only Indians is at issue, State law is generally inapplicable," 448 U.S. at 144, and noted that, where the conduct of non-Indians is sought to be regulated, it is appropriate to utilize the "particularized inquiry" test to balance Federal, tribal, and State interests. *See also*, *Ramah*, *supra*. In our present case the bingo law sought to be applied would affect the conduct of tribes operating their own bingo games. It would appear that there would be no need for a particularized inquiry; State law would be inapplicable. However, if the circumstances are construed so that a particular-

ized inquiry were appropriate, the Federal and tribal interests significantly outweigh any State interests.

Current Federal policies and regulations support tribal bingo enterprises as a viable and significant means of improving economic conditions on the reservation and as a major step toward achieving the national goal of Indian economic self-sufficiency. Such a policy nurtures the strength and dignity of Indian tribes and encourages their exercise of a measure of self-government and fiscal autonomy. *Mashantucket Pequot Tribe v. McGuigan*, 626 F.Supp. 245 (D.Conn. 1986). It is apparent that the interest of the AMICI INDIAN PUEBLOS in the continuation of their bingo enterprises is substantial. The State's purported interest is the feared intrusion of organized crime. Noting that no instances of intrusion are cited by Appellants, the AMICI INDIAN PUEBLOS have had a completely different experience, with no instances of unlawful acts or disreputable actors.[14] The speculations of the State do not present the Court with an interest sufficient to outweigh the tribal and Federal interests, particularly when coupled with the thrust of the pre-emption doctrine.

The suggestion that there are gaps in law enforcement which would require State regulation is specious and unfounded. This assertion ignores the plethora of Federal statutes designed to prohibit corrupt or criminal activities in Indian country by Indians and non-

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[14] The Honorable Paul Bardacke, Attorney General for the State of New Mexico, testifying before the Senate Select Committee on Indian Affairs concerning H.R. 1920 on July 17, 1986, stated at page 8 of his prepared statement, "In New Mexico Indian bingo has not created any law enforcement problems." See Appendix 6, the complete text of Mr. Bardacke's statement.

Indians alike. A lengthy recitation of applicable Federal laws seems hardly necessary, but any reference would include the Federal Enclaves Act, 18 U.S.C. 1152, the Major Crimes Act, 18 U.S.C. 1153 (*see also*, 18 U.S.C. 1342). There is little doubt that Federal statutes of general applicability apply on Indian reservations. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974). Thus, it is clear that the Anti-Racketeering Act, 18 U.S.C. 1961, *et seq.*, which prohibits, *inter alia*, corrupt activities involving gambling, could relate to Indian bingo under the appropriate circumstances. There are numerous other Federal statutes, some relating to Indian country, and more relating to general prohibited activity. (*See*, for example, 18 U.S.C. 1151, 1154, 1156, 1160-1162, 1164, 3113, 3242, 3488, 3618-3619). Congress and the Federal judiciary have had almost 200 years to deal with the problem of filling any "gaps," and have done a good job. At any rate, for the purpose of assessing how substantial a State interest in this matter, it is greatly outweighed by Federal and tribal interests.

IV. IF THIS COURT WERE TO ACCEPT APPELLANTS' ARGUMENT, IT WOULD DIRECTLY CONTRAVENE THE PROVISIONS OF PUBLIC LAW 83-280.

Public Law 83-280, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C.S. 1360, gave six States criminal and civil jurisdiction over Indian country and permitted all other States to acquire it at their option. In the few States such as California where P.L. 280 is in

effect, there exists some applicability of State law over on-reservation activities. As was correctly stated below in the instant case, the grant of civil jurisdiction over Indian reservations has been limited by this Court to give States jurisdiction only over private civil litigation involving reservation Indians in State court, rather than making all State laws of general application effective on the reservation. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976); *Barona Group of Capitan Grande Band v. Duffy*, *supra*. Section 2 of P.L. 280 confers criminal jurisdiction over offenses committed by Indians on the reservation, thus authorizing the application of State criminal/prohibitory laws on Indian reservations, but not civil/regulatory laws. *Barona*, *supra*. In the few states where P.L. 280 applies, then, there is some shift away from the exclusive jurisdictional power of the Federal government and the tribes. But, as the Court below stated, under P.L. 280 the application of State jurisdiction over Indian tribes depends on an analysis of the criminal/prohibitory or civil/regulatory dichotomy. The Court in *Barona* held that a State law is criminal/prohibitory if the activity the statute addresses violates public policy, and civil/regulatory if the activity does not. The opinion below turns on the proposition that criminal/prohibitory laws can be applied in Indian country insofar as tribal bingo activities are concerned, whereas laws that are generally civil/regulatory in nature cannot. The analysis which distinguishes between criminal/prohibitory actions on one hand, and civil/regulatory actions on the other, permits that the application of the law be harmonized in P.L. 280 states and in non-P.L. 280 states as well.

The AMICI INDIAN PUEBLOS urge this Court to consider the impact of reversing the Court below on the basis of an interpretation of a law which is applicable in only a few States. It should be emphasized that few States have exercised the option afforded by P.L. 280 to assume certain criminal and civil jurisdiction over Indian country; there are many more States where P.L. 280 is not in effect than where it is. The majority of States chose not to take on the criminal and limited civil jurisdiction permitted by P.L. 280 and to undertake the significant attendant burdens.[15] Non-P.L. 280 States, such as New Mexico, essentially have left intact Federal jurisdiction over Indian country in addition to reaffirming the doctrine of tribal sovereignty. New Mexico has consistently adhered to the doctrine of Indian self-government and has rejected the Congressional offer of jurisdiction over Indian country and Indian people. *Jim v. C.I.T. Financial Services Corp.*, 86 N.M. 784, 533 P.2d 1222 (1974), *remanded on other grounds*, 87 N.M. 362, 533 P.2d 751 (1975). In that case, the Court stated that "... Indian tribes have preserved their tribal relations ... as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws ... of the state. ..." (citing *McClanahan v. State Tax Commission of Arizona, supra*; *see also*, *State v. Begay*, 63 N.M. 409, 320 P.2d 1017 (1958), *cert. denied*, 357 U.S. 918, 2 L.Ed. 1363.)

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[15] There are fifteen states with total or partial jurisdiction under P.L. 280: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, Washington, Alaska, California, Nebraska, Minnesota, Oregon, and Wisconsin; the balance of the States are non-P.L. 280 states.

Appellants would have that this Court ignore the clear Congressional intent contained in P.L. 280 of affording States a binding option, and the clear intent expressed by the great majority of States in rejecting the effects of P.L. 280, and, by applying Procrustean logic, rule nonetheless that State law and enforcement thereof would apply fully to all Indian reservations. The manner in which criminal/prohibitory—civil/regulatory distinctions in a P.L. 280 State, are set out in the instant case below (and in the *Butterworth* and *Barona* cases), not only makes absolute sense but also is the sensible answer to applying a consistent national law which would bring into accord the conflicts which exist between P.L. 280 States on the one hand and non-P.L. 280 States on the other. This Court should feel impelled to embrace the essence of the decision below to achieve a harmonious and consistent application of the law.

CONCLUSION

Appellants would have this Court abruptly change the law which permits the conduct of Indian bingo and the fate of Indian tribes which have followed the dictates of national policy and engaged in enterprises specifically endorsed by the Secretary of Interior. For the reasons stated herein, it is respectfully urged that this Court affirm the decision below and continue its laudable tradition of enhancing tribal self-government and sovereignty, recognizing the plenary and largely exclusive power of the Federal government in dealing in Indian affairs.

Respectfully submitted,

L. LAMAR PARRISH, ESQ.
THEODORE W. BARUDIN, ESQ.
MICHAEL D. BUSTAMANTE, ESQ.
CAROL J. VIGIL, ESQ.
SCOTT E. BORG, ESQ.

APPENDIX 1

Governor
Mike Avila

Lt. Governor
Archie Chavez

Treasurer
Jose R. Trujillo

PUEBLO of SANDIA

Box 6008
Bernalillo, New Mexico 87004
(505) 867-2876/5021

August 26, 1986

Lamar Parrish, P.A.
USSERY & PARRISH
P. O. Box 487
200 New Mexico National Bank
Albuquerque, NM 87103

Dear Mr. Parrish:

This letter is in response to the information requested regarding the beneficial impact of Sandia Indian Bingo.

Sandia Pueblo's successful bingo enterprise, began operations in January 1984, under the authority of the Sandia Pueblo Tribal Council through an enabling ordinance that has been approved by the Bureau of Indian Affairs, Albuquerque, New Mexico Area and Agency offices. The building in which the bingo operation is housed was financed through a Bureau of Indian Affairs direct loan; the paved road leading to it was constructed by the Bureau of Indian Affairs. During the bingo enterprise's two and one-half years of operation, our reservation employment has been reduced to about three percent. Tribal members employed by the bingo operation are gaining experience at every level of the operation. Proceeds from the enterprise help to fund tribal government and public projects to benefit our tribal people; the Pueblo has generated an enterprise equity of $839,687 to date. Beyond tribal employees, Sandia Indian Bingo employs non-member Indian and non-Indian individuals and has paid $2,408,521 in sa-

laries and wages, while purchasing $2,880,289 worth of good and services primarily in the surrounding Albuquerque metropolitan area. Additionally, we make contributions to Albuquerque and other New Mexico charitable organizations. We have provided a wholesome enterprise, entertaining to the public and benefiting the Pueblo in specific concrete ways.

PUEBLO OF SANDIA
REPORT ON LABOR FORCE (Source: U.S. Dept. of Interion, BIA)

Date	Labor Force	% Unemployed
February 1983	94	11.7
February 1984	110	7.3
February 1985	124	4.0

The statistics from the above REPORT show an increasing labor force from February of 1983 to February of 1985, while for the same period of time the labor force unemployed shows a 7.7% decrease. If you compare these statistics with the number of individuals employed at the bingo from the SANDIA INDIAN BINGO EMPLOYMENT report below, it is apparent that our bingo enterprise has substantially contributed to reducing unemployment on the Sandia Reservation. Note that 36 Tribal members employed at the bingo represents 29% of Sandia's labor force at February 1985.

SANDIA INDIAN BINGO EMPLOYMENT (Source: FUTA Tax Report)

	Quarter Ending 6/30/86	% Of Total
Tribal Members	36	28
Non-Member Indians	19	15
Non-Indians	73	57
Total	128	100

A major objective in developing Tribally controlled busi-

nesses, is to overcome the problems many of our members have in obtaining time off from work to attend to cultural and important religious activities without being penalized in their jobs situations. The Pueblos still maintain a strong cultural and religious foundation which binds the people together into close knit communities which have survive these many hundreds of years. At Sandia Indian Bingo, Tribal members make up 28% of total employees another 15% non-member Indians, primarily from surrounding Pueblo communities, with the balance non-Indian employees. We have found this ratio of Indian to non-Indian employees, allows us to give tribal employees time off from work to fulfill their responsibilities to the Community without disrupting the operations of the business, and without penalizing employees for taking time off from work for legitimate tribal related purposes.

PUEBLO OF SANDIA
BINGO REVENUE

Period	Bingo Revenue	% Of Total Tribal Revenue
01/01-84-12/31/84	$710,505	65.5
01/01/85-12/31/85	$655,261	51.5
01/01/86-07/31/86	$304,657	27.4

Bingo revenues represent an important source of revenue to Sandia Pueblo. Bingo revenues, as with all other tribally generated revenues, flow to the tribal treasury which funds our tribal government and tribal services. Using 1984 as a base year, we have been able to increase our tribal budget by 83% in 1985 and 95% in 1986. Budget line items in 1984, 1985 and 1986 include Salaries and employee related expenses; Repairs and Maintenance on community facilities including sewer and water, tribal buildings, swimming pool, tribal vehicles and heavy equipment, office equipment; Professional and Legal Services; Training; Educational Grants; Tribal Court; Computer Equipment; Purchase of Equipment including office equipment and heavy

construction equipment; BIA Loans for commercial buildings; Development Planning; Volunteer Fire Department and Construction of Tribal Buildings.

I hope the above information is of assistance to you.

Sincerely,

/s/ MIKE AVILA
MIKE AVILA
Governor

APPENDIX 2

FIRST CAPITOL OF NEW MEXICO
SAN JUAN PUEBLO TRIBAL COUNCIL

P.O. BOX 1099
SAN JUAN PUEBLO, NEW MEXICO 87566
PHONE (505) 852-4400

August 21, 1986

Lamar Parrish
Attorney at Law
200 Rio Grande, Valley Bank Bldg.
P.O. Box 487
Albuquerque, NM 87103

Dear Larmar:

As per your request, listed below is the information you needed on our Bingo Operation.

1. To date, the Pueblo has earned $75,662.44. The Pueblo receives each month a check and the amount depends on the profits attained for the month.

2. The amount earned is currently in a savings account and when needed it will be used for Community and Government services.

3. Presently there are 28 Indians and one (1) non-Indian employed by the Bingo Operation.

4. From time to time, the Bingo Operation assist non-profit organizations with fund raising activities. Organizations assisted are: Santa Fe Indian School and the San Juan Pueblo Parrish.

Sincerely,

/s/ MANUAL R. TRUJILLO
MANUAL R. TRUJILLO
Acting Governor
Pueblo of San Juan

APPENDIX 3

TESUQUE PUEBLO
ROUTE 11, BOX 1
SANTA FE, NEW MEXICO 87501

September 12, 1986

Carol J. Vigil
Attorney at Law
214 McKenzie
Santa Fe, New Mexico 87501

Re: Amicus Brief

Dear Ms. Vigil:

Pursuant to your letter of September 12, the following information is provided for inclusion in the Amicus Brief that will be filed on behalf of the Tesuque Pueblo.

The Tesuque Pueblo reservation encompasses approximately 17,000 acres, ten miles north of the City of Santa Fe, in the State of New Mexico. The Pueblo is comprised of approximately 300 people. The Pueblo reservation is not comprised of land that is considered rich in natural resources but does have a main highway which traverses the reservation.

The contigious land to the highway is the only land that is amenable to development. As such the Tesuque Pueblo Tribal Council has continued to struggle with the traditions and customs of the Pueblo and that will maximize the revenue needed by the Tribe for governmental educational and social services.

The Tribe presently owns and manages a trailer court, which was recently expanded, and a recreational vehicle campground. Both are small operations and do not require a great deal of labor. There are various leases to private business people which provide the Tribe with very small yearly revenue.

With the Federal Governments cut backs a Tribe such as ours feels the impact of reduced revenue more strongly than other Tribes because of the smaller population. Without a large population base the few services available are shared with other Tribes.

Faced with the above situation the Tribal Council has been engaged in a continuous search for viable projects that will provide money to the Tribe so that desperately needed human and governmental services can be provided.

In 1983 the Council was approached by several people who were exploring the idea of locating a successful Bingo Hall in the Northern part of New Mexico on an Indian reservation. After the Council explored each proposal it selected an Investment Company from Florida who proposed to finance and manage the Hall. The Council contacted the Bureau of Indian Affairs to see if this project was legal. The BIA responded favorably and the Council began negotiations with the Florida corporation.

The Tribe enacted a Statute that provided for the Bingo activity to occur and be regulated. (The Statute was codified in the Tribal Law and Order Code in December, 1985.) Then financial statements, resumes and other pertinent information was obtained on the investors. This information was forwarded to both the Bureau of Indian Affairs and the Federal Bureau of Investigations. The final contract was signed and sent, along with the Bingo Statute, to the Bureau in June of 1984. The BIA responded on or about July 1985.

The Tribal Council had then and still has high expectations of the Bingo operation to sustain the Tribes responsibility to provide governmental, social, educational and other services to the people of the Pueblo.

In the 18 months the Hall has operated the Tribe has realized approximately $15,000 which is directed to the Tribes general fund. The fund is administered by the Tribal

Council for various activities and projects such as maintenance of the Tribal offices, activities for the youth and senior citizens. The Tribe is planning to save enough to pave some of the reservation roads that are at times impassable as well as provide higher education scholarships.

Since the Bingo opened the Tribe virtually has no unemployment. However, underemployment is still a problem in that the Bingo Hall is only opened on the weekend nights. Of the 50 employees 53% are Tesuque Pueblo Indians while the remainder are either Indians from the other 5 local Pueblos or non-Indians without exception, all employees are paid above minimum wage.

Security of the premises is provided by the Hall and law enforcement is provided by both the Tribe and the Bureau of Indian Affairs. The Bureau officers that are detailed to the Hall are cross deputized as New Mexico State Police Officers.

The Bingo Hall security has been trained to keep order in the Hall, patrol the premises 24 hours a day, 7 days a week. They maintain the area around the safe and the entrances and direct traffic. The BIA officers act as traffic controllers at the point of ingress and egress to the highway as well as maintain a regular check of the premises the nights of operation. There were times an escort was provided the Hall to the local bank when large amounts of case were deposited. During the entire 18 months of operation there has been *no* need to control or arrest anyone at the Hall or the outer premises. There has been no instance where there has been a suspicion that organized crime was present or otherwise active in the area. In the event an incident occured the BIA officers, being cross deputized, has the authority to arrest and detain both Indians and non-Indians. The Tribal police have the authority to arrest and detain Indian and non-Indians for a reasonable time, until the BIA officers arrive and take over. See State of New Mexico v. Ryder, et al.,

The local community is not only provided with entertainment but benefit directly from the income produced by the case awards but the utilization by the Hall of services and supplies. The local charities also are directly included in the cash awards. The Hall scheduled a charity night each month. The game winner, in addition to the cash award won, selected his or her favorite charity and the Hall made a direct contribution to the charity in an amount equal to the players award.

I hope this above information is adequate, and I and the Council approve its inclusion into the Amicus Brief you are filing in the *Cabazon* case on behalf of Tesuque Pueblo.

Sincerely,

/s/ TONY SAMUEL
for Guadalupe Duran
Governor

cc: Jim Hena, General Manager Tesuque Pueblo
Jack Bond, President, Investment Finance Management, Inc.

APPENDIX 4

ACOMA DEVELOPMENT AUTHORITY

Call the Acoma Pueblo Bingo Hotline
MON-FRI : 8 a.m.—4:30 p.m.
(505) 552-6604 Ext. 53
SAT & SUN: 552-6608

55 Miles West of Albuquerque
or 17 miles East of Grants.

TAKE I-40 EXIT 102 SOUTH
& FOLLOW THE BINGO SIGNS

Pueblo of Acoma
BINGO

September 12, 1986

Michael D. Bustamante, Esq.
ORTEGA & SNEAD
212 Twelfth Street, N.W.
Albuquerque, New Mexico 87102

Re: Information regarding Pueblo of Acoma Bingo for *Amici Curiae* Brief to U.S. Supreme Court

Dear Mr. Bustamante:

Per your request, I am providing herewith the pertinent information regarding Acoma bingo operations, which is drawn from the financial statements for 1986 and is current up to and including August 31, 1986.

In 1983, the Pueblo of Acoma, acting through its Tribal Council, promulgated a bingo ordinance and began operations shortly thereafter. The present facilities were constructed through use of Economic Development Administration federal funds. The building is presently used also as a community center for the Recreation Program (boxing, runners' conference, Recreation Coordinators' training), Child Care Program, and Community Health Representative training facilities. The Acoma Tribal Police Department is housed in the same building.

As of August 31, 1986, gross sales have amounted to $701,430.25 for the Pueblo of Acoma. Bingo revenues are utilized through the Pueblo's general fund and have generated a total enterprise equity of $387,000, or an approximate average of $20,000 per month. Contributions to the local community in the form of cash awards have been $520,623.31, with the bingo enterprise purchasing approximately $7,188.77 in goods and services from local merchants which have been used in prizes and awards.

Unemployment, a staggering 78% at Acoma Pueblo, has been reduce a full 15% due to bingo. Acoma bingo has been successful in creating diversified enterprises that hire tribal members and non-members. In addition to operating the bingo, child care, and snack bar concession, the Pueblo of Acoma has developed a gas station, supermarket, construction company, trading post, cafe, and a tribal recreation area. Bingo activities employ 35 persons for game operation, 8 persons for the food concession, and 2 persons for child care, with all of these positions filled by tribal members. In addition, the Acoma bingo has paid $60,790.30 to these 35 employees over the period of the bingo operation. The Acoma of Pueblo Child Care Center has received $9,477.76, and a double-wide trailer for child care facilities.

The Pueblo of Acoma has opened its facilities for the generation of charitable revenues for such organizations as the Special Olympics, the Handicapped Resource Center (Grants, NM), the local Catholic diocese, and for various tribal and local youth groups. In addition, a $2,000 donation is made at Christmas for purchasing clothes for local needy children. Over these past three years and as a direct result of bingo revenues, the Pueblo of Acoma has been able to replace those now depleted federal dollars for needed programs such as Head Start, Hot Lunch Program, aid for flood victims and homes lost to fire, education supplies, including a bus, and for alcoholism and Elderly Care programs.

The Pueblo of Acoma has provided this information to be utilized in the litigation involving the Cabazon Band of Indians presently before the Supreme Court of the United States. It is our hope that the information provided will assist the Court in reviewing and determining the importance, both economically and socially, that bingo has for the Pueblo of Acoma. But for the operation of bingo for the Pueblo of Acoma, the above programs, funds, and assistance to our tribal members would not have occurred.

Very truly yours,

/s/ GLENAL E. RILEY
GLENAL E. RILEY
Business Manager
Acoma Development Authority

GER/sgd

APPENDIX 5

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 7 1986

Memorandum

To: All Area Directors

From: Assistant Secretary—Indian Affairs

Subject: Review of Tribal Bingo Management Contracts

This memorandum replaces the memorandum of the Deputy Assistant Secretary—Indian Affairs (Operations) issued on July 20, 1984, and amended on April 9, 1985.

On August 6, 1985, the Secretary wrote to the Governor of the Pueblo of Santa Ana about the Pueblo's proposed pari-mutuel dog racing enterprise. In that letter, the Secretary stated that, "[U]nless and until the Congress identifies a more appropriate entity than this Department to review Indian gambling management contracts, it will be the policy of this Department to seek to exercise its authority under 25 U.S.C. §81 (or under any other appropriate statute) to engage in such review, provided the contract at issue is within the scope of the statute." For purposes of these guidelines, all gambling management contracts of tribes or tribal enterprises should be presumed to fall within the scope of 25 U.S.C. §81 (or 25 U.S.C. §415, if a lease is involved).

The Secretary's policy statement recognizes both the fact that bingo management contracts present the potential for imposition upon the tribes and the fact that the federal courts are continuing to hold that 25 U.S.C. § 81 makes tribal bingo management contracts null and void unless they are approved. The decision of the U.S. Court of

Appeals for the Seventh Circuit in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), which held that an unapproved contract was void, was discussed in the Secretary's letter. A more recent decision which reached the same conclusion is *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985).

I will be writing to the tribes to request that they submit their management contracts for review if they have not yet done so. You should also encourage the tribes in your Area which have unapproved contracts to submit them for review. If feasible, you should offer to assist them in re-negotiating the contracts to bring them into conformity with the guidelines.

It is my intention that these guidelines will be applied in reviewing all contracts submitted after August 6, 1985, but not yet approved, regardless of the date of the contract.

Management contracts for bingo will continue to be reviewed at the Area level pursuant to the guidelines below. Contracts for gambling other than bingo are to be transmitted to the Central Office for review. I intend to consult with the Attorney General of the state concerned before approving a management contract for gambling other than bingo to determine whether the gambling activity violates state criminal laws.

Until further notice, the following guidelines should be observed in reviewing tribal bingo management contracts.

1. Authority to approve of disapprove tribal contracts may not be delegated to the Superintendents. 10 BIAM 3.5A. Accordingly, tribal bingo management contracts may be acted on only at the Area level or above. However, the Superintendents should participate in the review process and offer their recommendations to the Area Directors.

2. The contract or an accompanying resolution must set forth the scope of authority of the tribal officials who have signed the contract on behalf of the tribe* and identify the provision of the tribal organic document which authorizes the contract.

3. The contract must set forth (1) the time and place where it was made, (2) the purpose for which it was made, and (3) the thing or things to be done under it.

4. The contract must have a fixed limited time to run, which must be distinctly stated.* The contract term should not exceed five years unless there is provision for renegotiation of the management fee or other adjustment of the fee to accommodate changes in circumstances. For contracts of longer than five years duration, the opportunity for renegotiation or other provision for adjustment should arise no later than five years after the contract is entered and thereafter at intervals of no longer than five years.

5. The contract must include the amount or rate per centum of the contractor's fee.* It should also specify the method of computing the fee.

6. The contract must specifically set forth any contingent matter or condition which constitutes a part of the contract.* The contract should state that it represents the entire agreement of the parties.

7. The contract should state that no payments have been made and provide that no payments will be made to any elected member of the tribal government or relative[1] of

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* All provisions followed by asterisks are statutory requirements contained in 25 U.S.C. § 81.

[1] For purposes of these guidelines, "relative" means an individual who is related to an elected member of the tribal government as a father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

any elected member of the tribal government for the purpose of obtaining or maintaining the contract or any other privilege for the contractor.

8. The contract must include or have attached a list of all parties in interest to the contract* including, on behalf of the contractor, all investors, including general and limited partners, all corporate officers and directors, all stockholders of a corporation, and all employees who will have day-to-day management responsibility for the gambling operation. The list must include the residence* and business addresses, occupations*, dates of birth and social security numbers of all such persons. If the contractor is a corporation, its articles of incorporation and the corporate resolution authorizing the contract should also be attached. Additional information, such as resumes of individuals or information on lenders, may be requested if you believe it will assist you in evaluating the contract.

9. The contract should state that no party in interest, as defined in paragraph 8, is an elected member of the tribal government or a relative of an elected member of the tribal government. The contract should provide that the contractor will require any party in interest who is elected to the tribal government or whose relative is elected to the tribal government to divest himself or herself of his or her interest in the contract.

10. The contract should state that no elected member of the tribal government, or relative in the immediate household of an elected member of the tribal government, may be an employee of the contractor or of the bingo enterprise.

11. The contract should specifically state whether assignments or subcontracts[2] will be permitted. If they are per-

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[2] "Subcontract" means any contractual arrangement between the contractor and a third party wherein the third party will have any responsibility for the gambling operation or access to the proceeds of the operation.

mitted, the contract should provide that no assignment or subcontract is valid until approved by the Secretary or his authorized representative in the BIA. Assignments or subcontracts submitted for approval should include or have attached a list of all parties in interest as defined in paragraph 8 above, including addresses, occupations, dates of birth and social security numbers.

12. Before any contract is approved, the names of persons submitted pursuant to paragraphs 8 and 11 should be transmitted to the FBI for name and record checks. All such names and results of the FBI checks should be sent to the Chief, Division of Law Enforcement Services, who will maintain a control file of this information. No contract, assignment, or subcontract should be approved where the FBI report shows a felony conviction or plea of nolo contendere for any such person. If the FBI report shows an indictment for any such person, the tribe should be so advised.

13. The contract should require the contractor to furnish the tribe, on at least a monthly basis, statements showing revenues and expenses of the gambling operation and should provide that an independent audit by a certified public accountant acceptable to the tribe will be performed at least annually.

14. The contract should provide that the tribe will receive its portion of the proceeds of the gambling operation on at least a monthly basis. The contract should specify the tribal official or bank account to whom the tribe's portion of the proceeds should be paid and such provision should be consistent with the tribe's constitution and bylaws.

15. The contract should set out the accounting procedures to be used and should provide that the contractor's books of account will be maintained, and its financial statements prepared, in accordance with generally accepted accounting principles.

16. The contract should provide that the tribe has the right to inspect the contractor's books at all reasonable times, such as during normal business hours, and should explicitly recognize the right of the tribe at any time to secure an independent audit of the contractor's accounts.

17. The contract should specifically identify those expenses which constitute operating expenses and provide a method, requiring concurrence by the tribe, for determining the allowability of non-enumerated expenses as operating expenses.

18. The contract should require the establishment of a cash management system adequate to safeguard the funds of the operation and should provide that the tribe will have the right to oversee the system.

19. The contract should have a provision for dispute resolution short of litigation, preferably through a private procedure, such as arbitration.

20. The contract should clearly set out the grounds and procedures for termination of the contract. Breach of contract should be a ground for termination.

21. The tribe should have a valid ordinance authorizing and regulating the gambling activity to be conducted pursuant to the contract, and the contract should state that the gambling operation will be conducted in accordance with the tribal ordinance.

22. The contract should identify the party responsible for employment and personnel matters. A provision for Indian preference is desirable.

23. The contract should be consistent with any related lease of trust land. If no related lease is submitted, the management contract should be examined to determine whether the relationship between the parties, as described in the contract, will require a lease. If it will, the tribe should be so advised.

24. The contract should provide that the contractor will not interfere with or attempt to influence internal affairs or governmental decisions of the tribe.

25. If existing provisions for law enforcement and fire protection are not adequate for the proposed enterprise, the contract should specify how these services will be provided.

26. Compliance with the National Environmental Policy Act is required before a bingo management contract (or related lease) is approved.

27. The contract should be reviewed for legal sufficiency by the Regional or Field Solicitor's Office. This is no substitute for review by Bureau officials under these guidelines, however.

28. If your opinion, after review of a contract, is that the contract may not be in the best economic interest of the tribe, you should advise the tribe of your opinion and the reasons for it. However, if the tribe still wishes to proceed with the contract, and it appears that the tribe has entered into it at arms length and after careful consideration, the tribe's business judgment should be respected, and the contract should not be disapproved solely on the grounds that the tribe may have been able to make a better bargain. On the other hand, where it appears from the contract itself or from surrounding circumstances that the tribe has made a particularly unwise business decision or has been subjected to outside pressure, the contract should not be approved. To assist you in this assessment, you may wish to ask the tribe to submit a narrative describing how the contractor was selected and how the contract negotiations were conducted.

29. If contract modifications sufficient to bring the contract into conformity with these instructions cannot be accomplished, the contract should be disapproved. If the

contract is disapproved, the tribe should be informed in writing of the reasons for disapproval.

30. Generally, the Superintendent should, within seven (7) working days of a tribal request to review a gambling management contract, transmit the documents submitted for review and approval to the Area Director. The Area Director should, within three (3) working days, send an acknowledgment of receipt of the documents to the tribe and the contractor. A final decision concerning the contract should be made as soon as possible, and not later than thirty (30) working days after the contract documents, the FBI reports, and Solicitor's advice are received and after it is clear that no further modifications of the contract will be made. A file should be maintained on the contract which is adequate to show the reasons for approval or disapproval of the contract.

31. Appeals from an Area Director's decision may be made pursuant to 25 CFR Part 2.

/s/ ROSS SWIMMER
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APPENDIX 6

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TESTIMONY OF PAUL BARDACKE NEW MEXICO ATTORNEY GENERAL BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS CONCERNING S. 902, H.R. 1920 AND THE ADMINISTRATION'S PROPOSED "INDIAN GAMBLING AUTHORIZATION AND REGULATION ACT OF 1986"

June 17, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Paul Bardacke, Attorney General of the State of New Mexico. I thank this Committee for the opportunity to comment on three separate Indian gambling bills, S. 902, H.R. 1920, and the administration's proposed Indian Gambling Authorization and Regulation Act of 1986 which, as I prepare this testimony, has not formally been introduced in the Senate. I appear here today in support of the administration bill. I cannot support S. 902 or H.r. 1920 in their present forms.

Because of citizen concern over Indian gambling and because of the legal issues surrounding Indian gambling, I have personally spent a great deal of time on this issue over the past three years. I am convinced that Congress is the proper forum for resolving this issue rather than the courts. I commend this Committee for trying to find a legislative solution to the problem of defining the proper role for Indian gambling.

New Mexico has four tribes currently operating bingo games with a fifth game ready to begin operation. These games represent an important source of revenue and employment to Indian tribes that are experiencing difficult economic times. While I appreciate the economic benefits of these games to the tribes, I must acknowledge hearing a great deal of concern and resentment from many in the non-Indian community over the availability of these games. Each of the three bills being discussed today acknowledge that the benefits of high stakes Indian bingo outweigh any disadvantages. I do not dispute that conclusion. To date high stakes Indian bingo games have not created law enforcement problems in New Mexico and there appears to be growing non-Indian acceptance of them. Given this current state of affairs I do not oppose high stakes Indian bingo as it is currently conducted in New Mexico.

At the same time New Mexico faces the possibility of more extensive tribal gambling that is not acceptable to the non-Indian community. Pari-mutual dog racing, an activity which is criminal under New Mexico law, was planned for a reservation bordering New Mexico's largest city until disapproved by the Secretary of Interior. The authority for that disapproval is presently being litigated. Citizen concern over forms of gambling other than bingo is very high in New Mexico and whenever the possibility of such gambling is mentioned in the newspapers or television, my office is inundated with calls.

On balance I find that the position expressed in the administration bill represents an excellent compromise. That bill legalizes bingo on Indian reservations, but limits all other forms of gambling in which non-Indian s are involved to the exact games allowed by the states under the same regulations as are imposed by the states. Unlike the administration proposal, neither S. 902 nor H.r. 1920 deals with the central issue in the area of Indian gambling—defining which Indian gambling activities should be legalized and which should be prohibited. I support the

administration proposal because it deals with this central issue and; I believe, reaches a reasonable position.

Twice in the past I have submitted comments on proposed Indian gambling legislation. While previous bills which I have examined have had points to commend them, each has also had limitations about which I have expressed concerns. I find that the proposed administration bill resolves each of my previous concerns. The great advantage to the proposed administration bill is that it deals with the tough issues and it deals with those issues clearly and directly and in a manner that will avoid endless litigation. I should like to comment on each of the proposed bills.

S. 902—S. 902 provides a mechanism for approving tribal ordinances and management contracts which, arguably, will protect Indian Tribes. This bill, however, does nothing to answer the important question of what gambling is legal. S. 902's biggest problem is its failure to deal with this issue, and S. 902 thereby insures that there will be endless litigation regarding which forms of gambling are legal.

There are other problems with S. 902:

(1) S. 902 provides that approval of tribal gambling ordinances is mandatory if certain minimum requirements are met, even if such ordinances are not in the best interest of the tribe. The United States' responsibility to tribes should go beyond a mechanical approach to the approval of ordinances.

(2) S. 902 provides that the conduct of gaming activities on a reservation, which activities have not been approved by the Secretary or the Commission, will be punished by existing federal law. If, as a number of courts have held, it is not a violation of existing federal law for tribes to engage in certain gambling activities, there is no criminal sanction for failure to have a tribal ordinance approved. S. 902, therefore, creates no incentive for a tribe to seek approval of its gambling ordinances.

(3) "Indian country" pursuant to S. 902 includes all land "held by an Indian tribe . . . subject to a restriction by the United States against alienation." Arguably, any land purchased by a tribe in any location is subject to restrictions on alienation. 25 U.S.C. Sec. 177 (No . . . conveyance of lands . . . from any . . . tribe of Indians, shall be of any validity . . . unless the same be made by treaty or convention entered into pursuant to the Constitution.) If a tribe violates gaming laws on such land, S. 902 provides that enforcement is to occur pursuant to tribal law or 18 U.S.C. Sec. 1152 (the Indian Country Crimes Act). 18 U.S.C. Sec. 1152, however, has a different definition of "Indian country" for purposes of jurisdiction than is found in S. 902. This second definition would not include off-reservation gambling and federal law, therefore, would also not apply to such lands. A tribe could arguably purchase land in downtown Albuquerque and be subject only to tribal law to control illegal activities.

H.R. 1920—H.R. 1920 ignores the issue of what gambling is lawful, by creating a four-year moratorium on Class III gambling. The toughest decision facing Congress is, therefore, delayed for four years. I find it difficult to believe that Congress needs four years to understand the impact of Indian gambling. Aside from the fact that H.R. 1920, like S. 902, avoids the most important issue related to indian gambling, H.R. 1920 has other problems:

(1) While H.R. 1920 makes most Class III gambling unlawful during the four-year moratorium, it is unclear which criminal provision will be used to punish this unlawful Class III gambling. Arguably, H.R. 1920 assumes that all Class III gambling is illegal under present law and will be punished under existing criminal law provisions. Whether current law makes Class III gambling illegal is presently in litigation in a number of forums. If present law does not apply to Class III gambling, there is no law under which to punish such gambling. The four-year moratorium is meaningless as it only precludes that Class III

gambling which is presently illegal. Litigation will continue on the issue of the present state of the law. I question the wisdom of passing a law that insures that litigation will flourish.

(2) The provision that Class III gaming operating as of January 1, 1986 can continue to operate if it is "otherwise legal under existing law" insures that there will be continued litigation over what is "otherwise legal under existing law."

(3) H.R. 1920 places Class I gaming, "social games for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of or in connection with tribal ceremonies or celebration", within exclusive tribal control. Class I gambling is not limited to tribal members. There is nothing to preclude tribal ceremonies or celebrations 365 nights a year at which non-Indians are welcome. It is unclear if horse or dog races or betting on athletic competitions or dice or any of a number of other activities would qualify as traditional forms of gambling. It is not clear who could challenge a tribal ordinance establishing such a Class I gaming system or how such a challenge could occur.

(4) Class II gaming, which is permitted under H.R. 1920, specifically includes "pull tabs, punch boards, and other games similar to bingo. . . ." If the Chairman of the Commission approves video games or blackjack or dog racing because he determines such games are "similar to bingo", it is unclear who can challenge that decision or where that challenge could be brought.

(5) H.R. 1920 makes the approval of gambling ordinances mandatory if certain minimum requirements are met. No discretion is given to act in the best interests of the tribe or tribal members. No flexibility exists to deny approval if a problem is found other than those specifically set forth in H.r. 1920.

(6) Under H.R. 1920 a tribal enterprise is required to have its bingo ordinances approved by the Chairman of the Commission. As under S. 902, it is not clear what, if any, penalty is attached to the operation of a bingo operation which has not had proper approval. Since bingo is arguably lawful under present law, unless H.r. 1920 imposes some sanction for unlawful games, no presently existing law may exist which imposes sanctions.

Proposed Administration Bill—At the time this testimony is being drafted, this proposal has not been introduced in the Senate although its provisions are well known. Indian gambling legislation cannot be discussed without mentioning this bill. All of the concerns that I have had with regard to past bills are dealt with in the administration proposal. The most important aspect of the administration proposal is that it is clearly drafted and will end time consuming and costly litigation. I commend the fine work of those who drafted this bill. I should like to comment on what will be the controversial portions of the proposal:

(1) Authority for No Limit Tribal Bingo Games

Many groups will oppose this provision. Some will argue that the Indian bingo cases were wrongly decided and should not form the basis for federal legislation. There are strong arguments on both side of the issue of whether Indian bingo will in fact be upheld by the United States Supreme Court. That question is unimportant. In New Mexico, Indian bingo has not created any law enforcement problems. Where I have had access to information on the economic benefits of Indian bingo, the reports have been extremely positive. I find it difficult to fault the compromise position expressed in the administration proposal legalizing bingo but precluding more expansive gambling operations.

(2) Allowing State Law to Determine What is Permissable Indian Gambling for Games Other Than Bingo

A number of tribes will object to letting state laws and regulations be the standard for determining what activities are legal for gambling other than bingo. The tribes' objections will most likely be based on arguments of tribal sovereignty. While I support the right of Indian tribes to be free from state interferences with regard to matters which are predominantly internal to the tribes, Indian gambling is not a sovereignty issue. To the extent that such gambling is an internal matter it is subject only to tribal regulation pursuant to Section 401. To the extent that such gambling is set up to bring non-tribal members on to the reservation to avoid state law, its impact is almost exclusively off reservation, and the issue is not one of sovereignty.

(3) The Grant of State Jurisdiction to Enforce Gambling Laws Other Than Bingo Laws

In the past I have taken the position that there should be federal and not state criminal law jurisdiction over gambling violations on Indian reservations. I realize this position is contrary to many other state Attorneys General. My concern was a matter of practicalities. In New Mexico, the state never assumed general criminal jurisdiction over on-reservation Indians, the federal government exercises that general criminal authority. It seemed to be a waste of resources to have federal law enforcement officers, who are regularly on the reservations, ignoring criminal activities concerning gambling while state officers who have minimal contact with the reservations were forced to investigate criminal activity in what, in New Mexico, can be extremely remote areas. There is also a great deal of resentment and fear every time the states assume additional jurisdictional authority over Indian reservations. I will not argue that tribal concerns over the hostile relationship between state and tribal government is unfounded.

It has, therefore, seemed to me that federal jurisdiction was more appropriate than state jurisdiction. At the same time I recognize that state regulated gambling activities, which in New Mexico would mean horse racing, can most effectively be regulated by the states rather than the federal government because states already have regulatory mechanisms in place.

The provision in the administration proposal which leaves primary enforcement authority in the state, but provides for federal criminal jurisdiction where justified, is a well considered compromise. I feel this solution, where both the state and federal government have criminal jurisdiction, will lead to cooperative efforts which will be more efficient and cost effective than placing criminal jurisdiction in only the state or only the federal government.

I express only one concern over the administration proposal. That concern is with Section 305(9) dealing with the dispensing of alcoholic beverages. It is not clear whether this is an alternative method to 18 U.S.C. Sec. 1161 for a tribe to obtain authority to sell liquor. 18 U.S.C. Sec. 1161 sets forth a specific procedure which must be followed prior to selling liquor in any country. Recent decisions of the United States Supreme Court have clearly determined the relationship between the states and tribes with regard to regulating liquor sales pursuant to Section 1161. It is not clear if the proposed Section 305(9) is in addition to, or an alternative to 18 U.S.C. Sec. 1161. If it is an alternative to Section 1161, it will be a matter for extensive litigation; if it is in addition to Section 1161, I have no concerns.

In closing I wish to again thank this Committee for the opportunity to speak on this important issue. I will be happy to answer any questions.

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NO. 85-1708

in the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, et al.,
Appellants,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,
Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE SEMINOLE TRIBE OF FLORIDA AND THE FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA OF MINNESOTA AS AMICI CURIAE IN SUPPORT OF THE APPELLEES

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INTEREST OF THE AMICI CURIAE

The Seminole Tribe of Florida and the Fond Du Lac Band of Lake Superior Chippewa of Minnesota operate bingo games on their respective reservations.

Those games attract non-Indians. Both Florida and Minnesota permit bingo to be played pursuant to statutory schemes which regulate the conduct of the games. *See* §849.093, Fla. Stat. (1985); §349.11 *et seq.*, Minn. Stat. (1985).

The Seminole Tribe and the Fond Du Lac Tribe have a substantial interest in this case. Affirmance of the Ninth Circuit's opinion will maintain the status quo, which for the Seminole's has been the product of the Fifth Circuit's decision in *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020. Reversal may affect the conduct of Seminole and Fond Du Lac bingo. Therefore, the Seminole Tribe and Fond Du Lac Tribe submit this amicus curiae brief urging affirmance of the Ninth Circuit's opinion precluding enforcement of California's bingo laws on Indian reservations.

THE SCOPE AND SUMMARY OF THE ARGUMENT

We leave the detailed analysis of case law to the parties and the other amici curiae.[1] The purpose of this Brief is to provide the Court with some insight into how bingo revenues have enabled the Seminoles and the Fond Du Lacs "to rehabilitate the Indian's economic

[1]These amici curiae adopt the legal arguments of the Appellee Tribes. We do not believe that the balancing test applies to this case. However this Brief does seek to flesh out some of the various factors which are encompassed by that test so that if the Court does opt for its mode of analysis, the Court will have some idea of the important contributions bingo has made to the health and welfare of the lives of members of the Seminole and Fond Du Lac Tribes.

life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,152 (1973), quoting H.R.Rep. No. 1804, 73 Cong., 2d Sess., 6 1934, explaining the intent and the purpose of the Indian Reorganization Act of 1934.

We also seek to inform the Court regarding the support the United States Bureau of Indian Affairs has provided for the creation and maintenance of bingo and how that support has contributed to the improved vitality of Indian life.

Finally, we comment on California's claims of a "serious risk of organized crime infiltration" and discuss why those fears are unsupported by the record, unsupported by the literature, and unfounded in fact. And we suggest that if the Court is inclined to give decisive weight to California's assertions, this case should be remanded to the District Court to determine whether those claims are supported by evidence.

I

THE IMPORTANT INTERESTS SERVED BY THE CONDUCT OF INDIAN BINGO

A. The General Principles

A starting point is:

> The principle of tribal self government, grounded in notions of inherent sovereignty and in congressional policies, seeks an

> accomodation between the interests of the Tribes and the Federal Government on the one hand and those of the State on the other.
>
> *Washington v. Confederated Tribes of Colville*, 447 U.S. 154,156 (1980).

It is no secret that the Tribes' interests are economic. The advent of Indian bingo has allowed the Seminoles and Fond Du Lacs to pursue their rights to self government and self improvement and to realize for the first time the promise of the Indian Reorganization Act of 1934. Congressman Udall recently commented upon the Tribes' need for revenue in the face of federal budget cutting measures:

> For them it is literally a matter of life and death. It is little wonder that they have so desperately turned to gaming for revenue. It is hard to understand those who would deny them this small source of hope.
>
> H.R.Rep. No. 488, 99th Cong. 2d Sess. (March 10, 1986) 12.

B. The Experience of the Seminole Tribe and the Fond Du Lac Band of Lake Superior Chippewa

1. The Seminole Tribe

There are 1669 enrolled members of the Seminole Tribe of Florida. Slightly less than half are under 18.

In 1966 the unemployment rate among Tribe members was 85 percent. At that time there were few

employment opportunities with the Tribe. In August, 1986, the unemployment rate was 30 percent. In August, 1986, 59 percent of employed Seminole tribal members were employed by the Tribe.

The Seminoles have five reservations in Florida, the three largest of which (Big Cypress, Brighton and Hollywood) are each home to about one-third of the Tribe's members. Big Cypress and Brighton are primarily low level wetlands to poorly drained sandy soils, and land use is limited to cattle operations, some truck crops and citrus, and aquaculture. Hollywood, the smallest of the three major reservations, is in the metropolitan area of Broward County, Florida and, in addition to housing tribal headquarters, is the center of tribal commercial development.

The sale, leasing or mortgaging of Indian Trust lands are governed by a complex scheme of federal regulations and statutes. *See*, for example, 25 CFR §§152.22, 152.23, 162.3, 162.5, 162.8, 162.12; 25 U.S.C. §177. Thus tribal development of its property is limited both by the nature of the property and the governmental processes which affect any potential development.

A primary source of income is bingo. Seminole bingo commenced in 1979. Since then those profits have enabled the Tribe to enhance the health, housing, education, law enforcement and communications needs of tribal members in ways that are both basic and extraordinary.

In 1982 a multi-purpose community center was built on the Hollywood Reservation to house a day care

center, a senior citizens center, and a health care center. Tribal member homes on the Big Cypress, Brighton and Hollywood Reservations were rehabilitated in 1980 and 1982 to bring them up to code requirements. In 1984 and 1985 Community Centers were constructed in Big Cypress and Brighton to house senior citizens, day care, and education programs. These facilities were all partially funded by the Tribe's revenues. Last year a medical social worker was hired, paid solely by the Tribe. The Tribe provides funds for nutrition programs, health delivery systems, commodity food programs, community care for the elderly and adult education programs.

Between 1945 and 1977 an average of 4.3 tribal members per year graduated from high school. From 1978-1986, there were an average of 13 high school graduates per year. From 1945 to 1977 nine tribal members received college or junior college degrees. From 1978 to 1986 twenty-eight members graduated from college or junior college, including one person who received a masters degree, and another who received a law degree. The Tribe now provides scholarships for worthy students, and of the 27 identifiable special education programs available to tribal members, 20 are either wholly or partially funded by the Tribe.

Since 1982 the Tribe has funded a Seminole Cultural Education program which operates on all the residential reservations. The program, which utilizes bilingual University of Miami specialists and other experts, seeks to retain the cultural values, knowledge and language of the Seminoles and heighten the awareness of the Seminole children to the uniqueness of their heritage.

A tribal newspaper, the *Seminole Tribune*, began publication in 1983 and is distributed to all tribal members as well as government offices, other Tribes, and various others interested in news of the Seminoles.

Finally, in 1981 the Seminole Police Department was created with law enforcement jurisdiction over the separate reservation areas. In the 1985-86 fiscal year the Department employed 26 full time personnel, with the Tribe bearing approximately 85 percent of the total cost of the Department's budget. The remaining portion is funded by the Bureau of Indian Affairs. The Department has been successful in apprehending non-Indian narcotics violaters and in the past two years has confiscated two planes and several vehicles engaged in narcotics violations in Indian country.

Bingo revenues have been an important part of the Seminole Tribe's ability to enhance and protect the lives of its members.

2. The Fond Du Lac Band of Lake Superior Chippewa

The Fond Du Lac Band of Lake Superior Chippewa has 4025 enrolled members, approximately 40 percent of whom are under 18. As recently as 1978 the unemployment rate among the members of the Tribe was 50 percent. Today the unemployment rate is about 20 percent, in large part because approximately 25 percent of employed members of the Fond Du Lac Band of Lake Superior Chippewa are employed by the Tribe. Only the Tribe has been able to provide these employment opportunities to its members.

The Fond Du Lac Band of Lake Superior Chippewa Reservation's presently recognized boundaries consist of approximately 100,000 acres in rural Northeastern Minnesota near the Town of Cloquet and a small parcel of land located in the center of Duluth, Minnesota. The rural reservation is comprised of a checkerboard of ownership with only one third remaining in some form of Indian ownership. Because all the prime land was sold by the United States Government to land speculators at the turn of the century, the remaining lands are generally of poor quality, being principally swamps, and generally located in poorly accessible areas. To provide additional housing for its members, the Fond Du Lac Band of Lake Superior Chippewa will be required to purchase additional land. The tribal wild rice beds and fisheries were substantially destroyed by the construction and subsequent abandonment of a system of drainage ditches by the Civil Conservation Corps in the 1930's. The timber resources were destroyed by a fire caused by Northern Pacific Railroad in the 1930's and only in the last ten years has any reforestation and timber management of any consequence occurred.

As with the Seminoles, the sale, acquisition, lease or mortgaging of Indian Trust Lands is controlled by a complex scheme of federal regulations and statutes. See, for example, 25 U.S.C. §177, 25 CFR §§152.22 and 23.

Therefore, the Fond Du Lac Band of Lake Superior Chippewa, in furtherance of their Constitutional Purpose (Constitution of the Minnesota Chippewa Tribe, Article I) commenced a tribal bingo operation in 1981 on a

portion of the Cloquet Reservation. Since then it's revenues have enabled the Tribe to improve the employment, health, housing, education, mental health, conservation and communications needs of its members.

For example, in 1985 the Fond Du Lac Band of Lake Superior Chippewa sold $750,000.00 in tribal bonds secured by its bingo revenues to finance the construction of a health care center on the rural Fond Du Lac Reservation. The tribal bingo revenues have also been used to purchase equipment for Fond Du Lac Manufacturing, a tribal metal fabricating business, and to secure a line of credit for the facility, thus increasing employment opportunities. These revenues have also been used to acquire equipment for the tribal construction company (Fond Du Lac Heavy Equipment & Construction Co., Inc.) and to help secure letters of credit for the construction company because of the unavailability of bonding for tribal construction companies, again increasing employment opportunities.

To promote better communications with its members and with its non-Indian neighbors, in 1984 the Fond Du Lac Band of Lake Superior Chippewa started a biweekly tribal newspaper. In cooperation with the Cloquet Pine-Knot, the local newspaper of record, the tribal newspaper is distributed free of charge to all of its subscribers and to all households on the reservation.

Since the advent of bingo on the Fond Du Lac Reservation the Tribe has started a 7-12 grade school financed and equipped, in part, by bingo revenues. The school is open to all residents of the Reservation. Prior

to the opening of the school 9.6 percent of members of the Tribe completed high school. Since then 80 percent of those eligible to graduate in any given year have completed high school.

The Tribe, in addition to supplementing the funding of the school, purchased equipment and school buses and participated in financing the expansion of the school. The Tribe has also funded programs to encourage its children in schools on or near the Reservation to complete their education. One such program, called the "Washington Experience", is open to all Fond Du Lac children in grades 10-12. Two children from each of the four school districts on and around the reservation are selected annually on the basis of a competitive essay and academic excellence during the school year to spend a week in Washington, D.C. to view first hand the workings of our national government.

The funds for these experiences and for much of the other newly available tribal opportunities are the product of bingo revenues.

The Federal Government has provided important assistance to the expansion of Fond Du Lac economic and social development through bingo. In 1983, the Department of Housing and Urban Development provided a $275,000 grant to construct the physical facility for bingo on the Reservation in Cloquet.

The Office of Community Service of the Department of Health and Human Services provided a grant of $750,000 in 1985 to aid in financing the construction of the Fond Du Lac Duluth bingo facility.

The Reservation in Duluth, which is the site of a recently opened bingo facility, was acquired in Trust for that purpose by the Department of Interior in 1985, pursuant to 18 U.S.C. §465. This acquisition was part of a joint economic development partnership agreement between the City of Duluth and the Fond Du Lac Tribe. That agreement will ultimately make the City of Duluth a 24.5 percent partner in Fond Du Lac bingo profits, and in return the City has obligated itself to construct a ramped parking garage for Fond Du Lac bingo patrons. The Bureau of Indian Affairs assisted in the preparation of that agreement and approved its contractual terms, including a requirement that the Bureau receive copies of quarterly audited profit and loss statements of the Duluth-Fond Du Lac bingo facility.

Thus the Federal Government's supportive assistance has been an important factor in Fond Du Lac efforts to rehabilitate their economic life and "to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152, *supra*.

II

THE STATE'S CONCERN ABOUT ORGANIZED CRIME IS NOT SUPPORTED BY THE RECORD NOR BY THE HISTORY OF INDIAN BINGO

The Ninth Circuit found "there is no evidence whatsoever that organized crime exists on these Indian reservations." *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900,904 (9th Cir. 1986).

California has offered nothing to contradict that finding, nor has the State advanced any principled basis for concluding that the specter of organized crime hovers over Indian bingo.

Indeed, California's exclusive reliance on "Organized Crime Studies", Brief of California at 27-29, belies its argument that Indian bingo creates "risks that do not arise concerning [the state authorized] charitable bingo." *Id.* at 26 (footnote omitted)

The California cited "studies" predate the advent of any Indian bingo.[2] Those studies voice concern for the integrity of *charitable* bingo, given the proliferation of charitable bingo events. Charitable bingo's pervasiveness and the income it generates (National Gambling Commission Report, JA at 132-33) sparked the call for regulation. Obviously the statewide operation of perhaps thousands of weekly charitable bingo events makes state regulation difficult, problematic and ineffectual.

Florida's statutorily authorized bingo is similar to that permitted in California. *See* §849.093, Fla. Stat. (1985). Minnesota shares a similar statutory scheme. *See*, §349.11 *et seq.*, Minn. Stat. (1985). The multitude and low visibility of state permitted bingo, which makes regulation inherently difficult, is in stark contrast to Indian bingo.

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[2]The National Gambling Commission Report was issued in 1976. (JA 119) The California Attorney General's Task Force on Legalized Gambling and Organized Crime Report was issued in 1971. See California Brief at 29.

The Seminoles have two bingo facilities; one on the Hollywood reservation and one on the Tampa reservation. The Fond Du Lacs also have two facilities, one on the Cloquet portion of the reservation and the other on Trust lands in Duluth. California suggests that approximately 100 Indian bingo games exist nationwide (Brief of California at 6).

Unlike the pervasive nature of state authorized charitable bingo, Indian bingo is limited, readily identifiable, easily monitored and extensively regulated by the Tribes. That is so since the Tribes' financial well being depends upon the games being honestly run and the generated income being closely monitored.

California quotes the Congressional testimony of a Deputy Assistant Attorney General as its "evidence" of the risk of "criminal infiltration" of Indian bingo. Brief of California at 26, n.16. That testimony merely states the concern that where substantial monies are involved, trouble could brew. But it does not address whether those concerns are substantiated by the facts of Indian bingo; it does not purport to be "evidence" tested by the crucible of adversary examination; it does not purport to support the notion that it should be the basis for eroding historic respect for Indian sovereignty.

Given California's single focus state interest of organized crime infiltration and the dearth of any actual record evidence to support its claim, the California "interest" should be accorded little, if any, weight. At the least, this case reminds one of the Court's language in *Askew v. Hargrave*, 401 U.S. 476 (1971), admonishing

against deciding serious constitutional claims "without fully developing the factual record at a hearing." *Id.*, at 479.

This case presents a grave threat to the sovereignty of Tribal nations and to the health, welfare and safety of thousands of Tribal members. Deciding it adversely to those interests based on unfounded and unsupported suppositions of "organized crime" is a disservice to the parties and the important issues presented by this case.

If the Court decides to exercise plenary review of this case, the Ninth Circuit decision should be affirmed. But if the Court seriously considers reversal of that decision, this case should instead be remanded to allow the District Court to conduct an evidentiary hearing to determine whether there is any factual basis for California's claimed concerns of "organized crime."

We are confident that if such a hearing were to occur, California's argument to this Court would be found to be devoid of factual merit.

CONCLUSION

For the foregoing reasons, and the reasons advanced by the Appellees and other amici curiae, the decision below should be affirmed. In the alternative, the case should be remanded to allow the District Court to determine whether California's "organized crime" and "gambling policy" have a factual basis justifying the erosion of Indian sovereignty.

Respectfully submitted,

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IN THE

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INTEREST OF AMICI CURIAE

The tribal *amici* are all federally-recognized Indian tribes which exercise powers of self-government. All tribal *amici* consider their ability to generate revenues, including bingo revenues where desired, as a key element in their efforts to control their destiny and decrease their dependence on the federal government.

For the Pueblo of Laguna of New Mexico, a main priority is improving the welfare of its members. The Pueblo of Laguna has developed numerous business enterprises that provide income to the Pueblo and employment for its members. The Pueblo currently does not engage in any bingo activities, but views this case as potentially reducing its options for increasing tribal independence and raising tribal members' standard of living without a corresponding need for increased federal funding. The Pueblo also views this case as one which potentially may infringe drastically upon the ability of the Pueblo to exercise its sovereign powers without state interference and subject tribal members to hostile state control.

The Agua Caliente Band of Mission Indians and the Chemehuevi Indian Tribe are located on separate reservations in California. While they do not now conduct bingo games on their reservations, they view the instant case as clarifying the scope of P. L. 280 and, more generally, the circumstances under which the state may have control over activities of their members, control which will affect dramatically the Tribes' options for development in the future.

The Gila River Indian Community believes that a reversal or modification of the decision below would have a substantial impact upon it and its members, the Pima Indian Tribe and the Maricopa Indian Tribe. The Tribes of the Gila River have since time immemorial maintained a system of government and, in more recent times, the Pima and Maricopa have organized as the Gila River Indian Community. In the summer of 1984, the Tribes entered into a lease development and management agreement to operate Jai Alai and, further, decided to allow parimutuel wagering on the reservation which has led to litigation with the State of Arizona raising issues similar to this case which have yet to be resolved. A reaffirmation of the Tribes' right to govern their own activities by this Court will enable the Tribes to improve

and expand various governmental programs involving tribal members' health and social welfare.

The Inter-Tribal Council of Nevada, Inc. ("ITCN") is incorporated under the laws of the State of Nevada. ITCN is an exclusive tribal membership organization composed of 25 federally-recognized Tribes. The general corporate mission of ITCN is to promote the health, education, business, cultural and governmental needs of its members. ITCN is a strong advocate of tribal government and places emphasis upon the Tribes' authority, management and jurisdictional integrity to govern their people.

The Miccosukee Tribe of Florida has an enrolled membership of over 500 Indians. While the Miccosukee currently do not operate any gambling activities on their Reservation, they view the operation of bingo games as an attractive means to generate substantial revenues for the Tribe. The Miccosukee Tribe is seeking to generate additional funds to bolster all aspects of tribal programs, ranging from education to economic development.

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally-recognized tribes representing a combined population of over 750,000 American Indian and Alaska Native people. NCAI and its members have a profound concern for the ability of Indian tribes to protect their sovereign immunity and self-governance rights. Such rights are critical to the survival of Indian tribes as distinct cultural entities, and to the economic development desperately needed to break the cycle of poverty which has plagued Indian people for generations.

The Northern Arapahoe Tribe of the Wind River Reservation is vitally affected by this litigation since it has conducted a bingo operation since 1984. That operation

is managed and controlled through the Northern Arapahoe Entertainment Committee, a tribal governmental body elected by the Tribe. Revenues from the bingo operation are used primarily for tribal employment.

The Poarch Band of Creek Indians conduct, pursuant to a Tribal ordinance and a contract approved by the Secretary of the Interior, a commercial bingo operation on the Tribe's reservation in Atmore, Alabama. The outcome of this case will directly affect the Tribe's sovereign authority to conduct its commercial business in order to raise governmental revenues free of state regulatory control.

The Puyallup Tribe of Indians is located in the western part of the State of Washington. The only natural resource which generates revenue for the Tribe or its members is the meager salmon fishery harvested under the Tribe's treaty rights. The Tribe licenses, regulates and taxes bingo games operated by members of the Tribe pursuant to a tribal ordinance approved by the Secretary. Tax revenue from these enterprises furnishes virtually all of what little non-federal revenue the Tribe generates in its effort to become more self-sufficient. The revenues from the bingo activities are used for tribal governmental purposes such as law enforcement, fisheries management, housing and the tribal school system.

The Red Lake Band of Chippewa Indians is located on the Red Lake Reservation in Minnesota, with almost two-thirds of its 7,500 total enrolled members living on the Reservation. The inherent rights of sovereignty possessed by the Red Lake Band have been recognized by the State of Minnesota[1] and the principle that the "State of Minnesota has no authority to govern the affairs of persons *within* the territorial boundaries of the Red Lake Reservation except as specifically authorized

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[1] The Red Lake Band has been excepted by Congress from the State's P.L. 280 jurisdiction.

to do so by Congress" has been accepted by the State of Minnesota. *Red Lake Band of Chippewa Indians* v. *State of Minnesota, et al.*, 311 Minn. 241, 248 N.W. 2d 722, 726 (1976). The Red Lake Band by tribal law for years has regulated the conduct of bingo games and presently operates a tribal bingo game managed by tribal members. The revenues generated by the tribal bingo games are used to stimulate economic development and supplement the tribal governmental budget.

The Sac & Fox Tribe of Indians of Oklahoma provides various governmental services to its members and all other persons within its jurisdiction, ranging from police and fire protection through a variety of social programs. The Tribe, although not an owner of a bingo operation, regulates and licenses bingo activity within its jurisdiction, and tribal revenues from bingo operations within its jurisdiction comprise a significant portion of the tribal tax base. The Sac & Fox Tribe has filed as an *amici* in this case in order to protect its tax base from interference by the State.

The Seneca Nation of Indians of New York is governed by a Tribal Council that has operated pursuant to a constitution for the last 140 years. The Seneca's bingo operation generates a significant portion of the total non-federal operating revenue of the Tribe. The revenues which the Seneca Nation generates are used to meet the needs of its 5,750 members in areas such as law enforcement, education, economic development and tribal government.

The Shoshone Tribe of the Wind River Indian Reservation in Wyoming has over 2,400 tribal members who reside on the Reservation. The Tribe currently does not engage in any bingo activities, but views this case as one which potentially may infringe drastically upon the ability of the Tribe to exercise its sovereign powers without state interference and subject tribal members to hostile state control.

Amici essentially are tribes whose ancestors bargained for and received Congressional acknowledgement of their right to reside on their reservation free from regulation by the states. Accordingly, the tribes have a considerable interest in halting the increasing tendency of courts, in effect, to lower the barriers to state jurisdiction over Indians on their reservations through the use of a "balancing of governmental interests" test.

SUMMARY OF ARGUMENT

In this case, California seeks to regulate Indian Tribes' conduct of bingo games on their reservations. These Tribes, however, enjoy an historic immunity from state laws on their reservations which was confirmed by Congress in the Act setting aside the reservations. Congress has not divested these Tribes of any relevant aspect of their immunity from State laws, such as authorizing the state to regulate the tribal bingo games. No federal law, including Public Law 83-280 and the Organized Crime Control Act, grants the State the jurisdiction it seeks here or makes the Tribes' conduct of bingo games a federal offense. Accordingly, this case is controlled by the rule in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973), that state laws are not applicable to Indians on a reservation absent express federal consent.

Appellants, nonetheless, seek to avoid *McClanahan* by urging that the relevant federal laws and the backdrop of Indian immunity from state laws in this case be ignored through the application of a balancing test to determine whether the State may regulate the Tribes. Appellants argue, pursuant to the balancing test, that state interests outweigh federal and tribal interests. The application of a balancing test, however, to determine whether a state has regulatory jurisdiction over *Indians* on a reservation never has been employed by this Court. Instead, the balancing test has been applied only where state regulatory jurisdiction over *non-Indians* on a reservation,

with respect to whom states may have legitimate interests, was at issue. Thus, to apply a balancing test in this case would require the Court to ignore over 150 years of its federal Indian decisions.

Appellants also allege that in the absence of state jurisdiction, organized crime, among other horribles, will pervade the tribal games. No such evidence exists in this case. Moreover, even if such evidence existed, federal and tribal laws are adequate to address any problem which may arise at the games. And, in any event, Appellants' remedy properly is legislative rather than judicial in light of this Court's long deference to Congress where adjustments to Indian immunities are sought.

ARGUMENT

I. CALIFORNIA'S ATTEMPT TO REGULATE INDIAN TRIBES' CONDUCT OF BINGO GAMES ON THEIR RESERVATIONS IS PRE-EMPTED UNDER FEDERAL LAW.

A. Where Indian Tribes Enjoy a Tradition of Immunity from State Regulation That Is Confirmed by Congress, This Court Long Has Held That Immunity May Not Be Repealed Absent the Clear Consent of Congress.

1. *The Applicable Law.*

Stripped to its essence, this case concerns the attempt by a state, without Congressional consent, to impose its laws upon Indian tribal governments on their reservations. The state laws at issue—regulating the conduct of bingo games—are imposed directly upon Indian tribes that operate bingo games on their reservations, rather than upon the Indian and non-Indian participants in those games. *See, e.g., Cabazon Band* v. *County of Riverside*, 783 F.2d 900, 901 (9th Cir. 1986). This case, therefore, falls squarely within the long-standing rule of federal Indian law that: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall

apply." *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 170-171 (1973), *quoting from* U.S. Department of the Interior, Federal Indian Law 845 (1958).

Appellants, nonetheless, seek to avoid *McClanahan* and numerous other decisions by urging (1) the State has regulatory jurisdiction over the Indian Tribes' bingo games because, upon the application of a balancing test, State interests outweigh federal and tribal interests,[2] and (2) the Tribes, in any event, have been divested of their immunity from state control sufficiently to permit the State to regulate the Tribes' bingo games. Neither assertion has any merit because a balancing test never has been employed by this Court where state regulatory jurisdiction on a reservation over Indians, in contrast to non-Indians, is at issue and, in this case, the Tribes' historic immunity from state control was confirmed by Congress in the Act setting aside the reservations, 26 Stat. 712 (1891), which immunity never subsequently was repealed.

Specifically, Appellants' proposed balancing of governmental interests, to determine whether state jurisdiction lies over activities on an Indian reservation, has been applied by this Court *only* where a state seeks to impose its law upon *non-Indians*. In those circumstances, states arguably have legitimate interests at stake and, moreover, no federal treaty or laws, in the first instance, immunize non-Indians in Indian territory from state control. The same simply cannot be said where Indians in Indian territory are proposed to be regulated by a state, in light of tribes' long immunity from state control and the existence of federal laws, such as treaties and Acts setting aside the reservations, confirming that immunity. Indeed, it was for these reasons precisely that this Court

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[2] In particular, Appellants urge that the undermining of state gambling laws resulting from tribes' conduct of bingo games on their reservations free of state laws, non-Indian participation in the tribal games and the mere fear of organized crime infiltration in those games are State interests this Court must weigh against federal and tribal interests to uphold State jurisdiction in this case.

in *McClanahan* ruled that the relevant federal treaties and laws, read against a backdrop of Indian immunity from state control, rather than a balancing of governmental interests, govern the determination of whether Congress has manifested the requisite clear consent to state regulatory jurisdiction over Indians on a reservation. 411 U.S. at 173, 179. In *McClanahan*, this Court specifically rejected the balancing test in the context of state regulatory jurisdiction over Indians, observing:

> we reject the suggestion that the Williams test [under which a balancing of governmental interests is required] was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians. . . . In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. 411 U.S. at 179.

Accordingly, Appellants' proposed balancing of governmental interests to determine whether state jurisdiction lies in this case plainly is inapplicable as it conflicts directly with *McClanahan*.

The proposed balancing test also conflicts with over 150 years of federal law and policy. Specifically, beginning with *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), where this Court held the State of Georgia had no authority to impose its laws within Indian territory in light of Indian tribes' original sovereignty and the treaty at issue there, states repeatedly have been denied any jurisdiction in Indian territory except: (1) where Congress plainly has divested Indian tribes or their members of some relevant aspect of their original immunity from state laws or has manifested clear consent to state jurisdiction over Indian tribes or their members in Indian territory; or (2) in certain extraordinary circumstances which justify a state's imposition of its laws directly upon non-Indians in Indian territory.

This Court's reluctance to uphold state jurisdiction over Indians on their reservations is rooted firmly in

longstanding federal law and policy recognizing Indian tribes as sovereigns insulated by an historic immunity from state and local control. *See McClanahan*, 411 U.S. at 168, *citing Rice* v. *Olson*, 324 U.S. 786, 789 (1945). In *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886), this Court considered the source of tribes' immunity from state laws, observing:

> [t]*hey* [*the Indian tribes*] *owe no allegiance to the States*, and receive from them no protection. Because of the local ill feelings, *the people of the States where they are found are often their deadliest enemies. United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886). (Emphasis added.)

In view of tribes' historic immunity from state control, this Court has been reluctant to find a repeal by implication of that established tradition of immunity and self-governance. *See, e.g., Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). Moreover, because Indian tribes' immunity from state control typically was confirmed clearly by Congress, this Court consistently has been loath to disturb such immunity without clear manifestations of Congressional intent to repeal the immunity. *See, e.g., McClanahan*, 411 U.S. 164 (1973). *See also*, Cohen, *Handbook of Federal Indian Law* 116-117 (1942 ed.).

In determining whether a repeal of tribes' immunity from state control has been enacted, the Court employs special rules of construction, noting: "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. 2399, 2403, *citing Oneida County* v. *Oneida Indian Nation*, 105 S. Ct. 1245, 1258 (1985). One of those rules which is applicable here, is that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *see, e.g., McClanahan*, 411 U.S. at 174.

Applying the above-described rules and presumptions, in *McClanahan*, for example, this Court unanimously held

that Indian income and property on an Indian reservation are not subject to state taxation, and in so holding did not employ a balancing test. The Court first noted state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. *Id.* at 170-171. The Court then acknowledged a tradition of tribal immunity from state taxation of Indian income and property in Indian territory before turning to the relevant treaty and statutes. *Id.* at 173. In the relevant treaty, the Court observed the provision setting apart a prescribed reservation "for the use and occupation of the Navajo tribe of Indians," applied the rule that ambiguous provisions are to be interpreted in favor of tribes, and concluded,

> [w]hen this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos . . . was meant to establish the lands as within the exclusive sovereignty of the Navajos under general supervision. *Id.* at 174-175.

The Court further reasoned:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States . . . *thus far not brought under the laws of the Union or of the State within whose limits they resided.* *Id.* at 172-173. (Emphasis added.)

Similarly, in *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. 2399 (1985), this Court was presented with the question whether states may tax Indian royalty income produced from on-reservation tribally-owned min-

erals. The Court first observed that, in light of the backdrop of Indian sovereignty, states may tax Indians in Indian territory only when Congress has manifested clearly its consent to such taxation. The Court then held States have no authority to tax Indian mineral royalty interests because the relevant mineral leasing acts do not contain the requisite explicit consent to such taxation. 105 S. Ct. at 2404. The Court reasoned:

> [i]f *the tribal organization . . . is* preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' . . . *separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union. Id.* at 2403, *quoting from The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). (Emphasis added.)

Accord, Moe v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971); *Bryan v. Itasca County*, 426 U.S. 373, 375-378; *see also*, U.S. Department of the Interior, Federal Indian Law 845 (1958) (". . . State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.").

This Court has sanctioned state jurisdiction over Indians on a reservation only where Congressional enactments plainly have divested the Indians of their immunity from state control. None of these cases, however, supports the State's position here that a balancing test may be employed to uphold state regulatory jurisdiction over Indians on a reservation.

For example, in *Rice* v. *Rehner*, 463 U.S. 713 (1983), this Court held a state could require an Indian on a reservation to obtain a state license to sell liquor on the reservation. In support of its decision, this Court opined,

> Although in Indian matters, Congress usually acts 'upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,'

> Williams v. Lee, 358 US 217, 220, 3 L Ed 2d 251, 79 S Ct 269 (1959), *that assumption would be unwarranted in the narrow context of the regulation of liquor. In addition to the Congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose regulations related to liquor transactions.* 463 U.S. at 723. (Emphasis added.)

The Court thus concluded, ". . . tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *Id.* at 722, further observing:

> There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area. *In the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development'* . . . With respect to the regulation of liquor transactions, as opposed to the state income taxation involved in McClanahan, Indians cannot be said to 'possess the usual accoutrements of tribal self-government'. *Id.* at 724. (Emphasis added.)

In short, in *Rehner*, in the unique context of liquor control, this Court found Congress plainly had divested tribes of an aspect of their tradition of immunity from state control and, moreover, had authorized explicitly state jurisdiction over Indians in Indian territory.

In sum, this Court never has employed a balancing of governmental interests test to determine whether a state may assert its jurisdiction over Indian tribes on a reservation. Instead, in every case, that determination is governed by the relevant backdrop of tribal sovereignty and the federal laws confirming that sovereignty. Amici, therefore, urge that this Court not depart radically, as urged by Appellants in this case, from over 150 years of its federal Indian decisions, none of which employed a balancing test in cases where, as here, a state attempts to

regulate directly an Indian tribe on its reservation. *See, e.g., Three Affil. Tribes of Ft. Berthold* v. *Wold Eng'g*, 106 S. Ct. 2305, 2310 (1986).

2. *The Law Cited by Appellants Plainly Is Inapplicable Here.*

In support of their theory that a balancing test be employed here, Appellants borrow liberally *dicta* from *McClanahan* and *Rehner*. Brief for Appellants at 17-18. That *dicta*, however, is a general discussion of principles of state jurisdiction over non-Indians, as well as Indians, in Indian territory and thus should not be taken out of its context to support Appellants' novel theory here concerning state jurisdiction only over Indians.

Appellants also cite in support of their balancing test, *inter alia*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983), and *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), both of which concern only state jurisdiction over *non-Indians* in Indian territory. Brief for Appellants at 30-32. The record here makes clear, however, that the state laws at issue are to be imposed upon Indian tribes on their reservations. Thus, the federal pre-emption analysis contained in the *McClanahan* line of cases, rather than *Bracker's* balancing of governmental interests, controls in this case.

In *Bracker*, where the state proposed to tax non-Indians who had contracted to haul logs for an Indian tribe on its reservation, the Court noted that the ". . . determination does not depend on mechanical or absolute conceptions of state or tribal sovereignty, but also call[s] for a particularized inquiry into the nature of state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. The Court, moreover, is guided by two independent barriers to state jurisdiction over non-Indians in Indian territory—namely, whether the state jurisdiction infringes upon tribal self-government, *see, e.g., Williams* v. *Lee*, 358 U.S. 217 (1959), or is pre-empted by federal law, *see,*

e.g., *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). In both cases, the Court balanced the relevant governmental interests to determine whether the state had sufficient interests to justify its jurisdiction over non-Indians on a reservation. *See, e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) (under the balancing test, the State has no authority to require licenses from non-Indians hunting and fishing on tribal lands within a reservation). In stark contrast, this Court has not balanced the respective governmental interests in any case involving state jurisdiction over only Indians in Indian territory.[3]

Appellants also cite *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), in support of their position that tribes may not market immunities from state laws to non-Indians, arguing the tribes are marketing their immunities in the bingo games. Brief for Appellants at 13-16. *Colville*, however, does not support Appellants' position for two reasons. First, in Colville, wherein this Court sanctioned state taxation of non-Indians who purchase cigarettes from Indians on a reservation, this Court upheld state regulation of non-Indians. At issue here, in contrast, is a state's attempt to regulate an Indian tribe on its reservation. *Colville*, therefore, simply is inapplicable. Moreover, in any event, *Colville* cannot be construed so broadly as holding tribes may not market their immunities to non-Indians free of state regulation. Instead, *Colville* only holds that where

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[3] It has been suggested that constitutional principles prohibit this Court from balancing governmental interests to determine whether state jurisdiction lies with respect to Indians in Indian territory. A balancing of governmental interests, in the view of commentators, can occur only pursuant to the Indian Commerce Clause and where non-Indian activity is sought to be regulated. *See* Feldman, *Preemption and the Dormant Commerce Clause: Implications in Federal Indian Law*, 64 Ore. L. Rev. 667 (1986); *see also*, Pelcyger, *Justices and Indians: Back to Basics*, 62 Ore. L. Rev. 29 (1983).

non-Indians on a reservation might benefit from tribal immunities, in the application of a balancing test to determine whether state jurisdiction lies with respect to such non-Indians, the tribe's interests are outweighed by the state's where what is being marketed is not reservation-produced, and no significant federal and tribal policies or services are involved. Stated another way, the marketing of tribal immunities alone is not dispositive of whether state jurisdiction lies over non-Indian activities on a reservation. Instead, numerous factors weigh in that calculus. *See Colville*, 447 U.S. at 155-161; *see also, Bracker*, 448 U.S. at 145-152.

In light of the foregoing, Amici will show below that upon application of the federal pre-emption principles described in *McClanahan*, and in light of the fact that the Tribes in this case have not been divested by Congress of any relevant aspect of their immunity from state civil/regulatory control, the conclusion is compelled that the State lacks jurisdiction over the Tribes' conduct of bingo games in this case.

B. The Backdrop of Tribal Sovereignty in This Case Is Imbued With a Tradition of Immunity from State Regulation.

The determination whether a state has jurisdiction over an Indian tribe in Indian territory turns initially on whether historically, ". . . tradition has recognized a sovereign immunity in favor of the Indians in some respect." *Rice* v. *Rehner*, 463 U.S. at 719. That tradition, of historic Indian self-governance and immunity from state control, constitutes the backdrop of tribal sovereignty against which the relevant federal treaties and other enactments are read to determine whether the asserted state jurisdiction is pre-empted under federal law.

In *Rehner*, this Court determined that no Indian immunity exists with respect to the licensing and distribution of alcoholic beverages by Indians in Indian territory because Congress first imposed an absolute prohibition

against such activities and later plainly subjected such activities to state regulation; moreover, no federal policy supporting tribal self-sufficiency and economic development was evidenced in the context of liquor regulation. *Id.* at 723. The Court, therefore, concluded states may regulate the sale of alcoholic beverages by Indians in Indian territory.

In contrast, and quite unlike *Rehner*, here the Tribes have not been divested of any relevant aspect of their tradition of immunity from state law for several reasons. First, Indian bingo games in Indian territory, conducted as part of tribes' governmental function of raising governmental revenues, never have been prohibited under federal law.[4] Moreover, as discussed fully by Amici below, Congress has not authorized state regulation of Indian bingo games. Finally, the record in this case demonstrates firm federal policies supporting Indian tribal bingo games as a means to promote tribal self-sufficiency and economic development. *See Cabazon Band* v. *County of Riverside*, 783 F.2d 900, 904-905 (9th Cir. 1986).

The only federal laws which Appellants assert have divested the Indian tribes of their inherent immunity from state laws with respect to raising governmental revenues—here through the conduct of bingo on their reservations—are the Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982), and the Organized Crime Control Act of 1970, 84 Stat. 937 (1970), 18 U.S.C. § 1955. As shown below and discussed more fully by other Amici in this case, however, neither of these laws properly can be construed as divesting the Tribes of their tradition of immunity from the state laws in this case.

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[4] As the Ninth Circuit correctly emphasized, "The focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity. The Tribes in this case are engaged in the traditional governmental function of raising revenue. 783 F.2d at 906.

1. *Public Law 83-280.*

Congress has granted California limited jurisdiction over individual Indians in Indian territory pursuant to Pub. L. No. 83-280.[5] Of central concern in this case, therefore, is whether the grant of civil and criminal jurisdiction over individual Indians in Indian territory contained in P.L. 280 includes California's regulation of bingo games conducted by Indian tribes in Indian territory. Amici assert the grant is not so broad as to include the state laws at issue here.[6]

The primary issue before the Congress during the consideration and the enactment of P.L. 280 was the problem of lawlessness on certain Indian reservations. For example, certain reservations were excepted from P.L. 280 because they had "a tribal law and order organization functioning in a reasonably satisfactory manner." H.R. Rep. No. 848, 83rd Cong., 1st Sess. 5-6 (1953). Section 2 of P.L. 280, accordingly, contains a consent to state jurisdiction over criminal offenses committed by Indians in the Indian territory. As discussed below, Amici assert that since the laws at issue here are not criminal in nature, § 2 does not support the State's asserted jurisdiction.

Of more relevance in this case, therefore, is the scope of the grant of civil jurisdiction contained in § 4 of P.L. 280. In light of the exclusive focus in P.L. 280 upon problems of law enforcement and legal disputes between

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[5] Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588-90 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982) (hereinafter P. L. 280).

[6] Because Amici will show herein that P.L. 280, in any event, does not authorize the state jurisdiction at issue here, Amici do not address the compelling argument that state jurisdiction over Indian tribal governments, as compared to tribal members, was not encompassed within the P.L. 280 grant of jurisdiction. *See, e.g., Three Affil. Tribes of Ft. Berthold* v. *Wold Eng'g*, 106 S. Ct. at 2314; *Bryan* v. *Itasca County*, 426 U.S. at 387-388.

reservation Indians, this Court has held that P.L. 280 grants only that civil jurisdiction necessary to resolve private disputes between Indians, and Indians and private citizens. *See Bryan* 426 U.S. at 383. Stated another way, state civil/regulatory laws, such as the laws at issue here, are not encompassed within the P.L. 280 grant of jurisdiction. As this Court in *Bryan* opined.

> we conclude that construing Pub L 280 in pari materia with [the contemporaneous termination] Acts shows that if Congress in enacting Pub L 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians it would have expressly said so. [*Bryan*, 426 at 390. *See also*, *Bryan*, 426 U.S. at 384 n. 10.]

Whether California's law governing bingo operations within the State is civil/regulatory, and thus outside the grant of P.L. 280 jurisdiction, has been decided by the Ninth Circuit. *See Barona Group of Capitan Grande Band, Etc.* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). *See also*, *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) (finding a similar Florida statute concerning bingo to be civil/regulatory in nature).

In *Barona*, the Ninth Circuit considered whether California's statutory scheme, which exempts bingo from its general prohibition against gambling, is criminal in nature, thus allowing California to exercise jurisdiction over Indians in Indian territory pursuant to § 2 of P.L. 280. Applying the rule that the intent of the State legislature in setting up the particular statutory scheme determines whether a statute is regulatory or prohibitory, the *Barona* court held that California's statutory scheme is civil/regulatory because California does not provide for a general prohibition against bingo. Instead, the State regulates bingo as a money making venture, allows diverse organizations to conduct bingo operations, and per-

mits the general public to participate in those games. *See Barona*, 694 F.2d at 1189, following the rationale of *United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977), wherein the court noted the mere existence of criminal penalties in the statute was not dispositive, before concluding that a state fireworks law was prohibitory in nature. Amici urge that no law or policy requires this Court to disturb the *Barona* court's conclusions.[7]

2. *Organized Crime Control Act of 1970.*

Appellants assert that Congress, through Section 803(a) of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 ("OCCA"),[8] has "affirmatively authorized" state regulation of Indian reservation bingo. Brief for Appellants at 31, 41-42. The State further theorizes that § 1955 expresses federal policy permissive of state regulation of Indian reservation gambling as clearly as this Court has held 18 U.S.C. § 1161 expresses federal policy permissive of state control of reservation liquor sales. *See Rehner*, 463 U.S. 713 (1983). Appellants' assertions are without foundation.

The Ninth Circuit concluded in this case, 783 F.2d at 902, that the State laws at issue here are civil rather than criminal in nature. Amici assert here, as will other Amici, and as they did with respect to P. L. 280, that no reasons of law or policy compel this Court to disturb the Ninth Circuit's construction of the State laws at issue. Accordingly, as discussed below, since the OCCA incorporates only the criminal laws of a state, the OCCA cannot be construed either as authorizing the state regulation at issue here or permissive of state regulation on the ground that the activity conflicts with federal law.

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[7] Other Amici in this case will discuss in more detail the reasons why the law at issue is civil/regulatory rather than criminal/prohibitory in nature.

[8] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of United States Code).

Section 1955 was enacted to enable federal officials to help states enforce their anti-gambling laws by assimilating such of those laws which are criminal in nature into federal law.[9] Nothing in the statute itself nor its legislative history provides support for Appellants' arguments that the law expanded state jurisdiction to include civil regulation of Indian tribal bingo operations on reservations within the State. The absence of any such support is illustrated by Appellants' failure to refer the Court to any part of the legislative history of the OCCA.[10]

Section 1955 is part of a federal jurisdictional scheme designed to give federal law enforcement officials authority to combat large-scale syndicated gambling operations by making violations of state criminal gambling laws violations of federal law as well. In creating a federal syndicated gambling offense, Congress intended to extend the reach of federal jurisdiction over interstate gambling activities without pre-empting state law. *See, e.g.*, 116 Cong. Rec. H35295. In short, § 1955 merely incorporates state law into *federal* law.

In light of the foregoing, contrary to Appellants' arguments, § 1955 plainly does not expand the reach of state law or state law enforcement jurisdiction to include In-

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[9] 18 U.S.C. § 1955 reads in relevant part: "(b) As used in this section—(1) 'illegal gambling business' means a gambling business which—(i) *is a violation of the law of a State or political subdivision in which it is conducted*;" (Emphasis added.)

[10] Congress's consideration of the legislation eventually enacted as the OCCA spanned two years. *See, e.g., Hearings on S.30 and Related Bills Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (hereinafter *Hearings*); H.R. Rep. No. 1549, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007; S. Rep. No. 617, 91st Cong., 1st Sess. (1969); 116 Cong. Rec. S36280 (Oct. 12, 1970); 116 Cong. Rec. H35287 (Oct. 7, 1970); 116 Cong. Rec. H35191 (Oct. 6, 1970); 116 Cong. Rec. S952 (Jan. 23, 1970); 116 Cong. Rec. S820 (Jan. 22, 1970); 116 Cong. Rec. S575 (Jan. 21, 1970); 115 Cong. Rec. S769 (Jan. 15, 1969); 115 Cong. Rec. S39906 (Dec. 18, 1969).

dian reservations or any other geographic area over which a state does not already have jurisdiction. Stated differently, § 1955 neither adds to nor subtracts from a state's existing jurisdiction over gambling activities otherwise subject to state law. Similarly, despite Appellants' assertions to the contrary, App. Br. at 42 n.26, the OCCA grants no authority to state officials to enforce the federal law. Indeed, the granting of any such enforcement authority would be pointless because state officials already have authority to enforce their own laws where those laws apply. As explained by the Department of Justice during hearings on the legislation:

> The [OCCA] will not interfere with a State's right to regulate the conduct of citizens *within its jurisdiction.* It is an anti-racketeering measure only and . . . *will be enforced by the Department of Justice* strictly in accord with its legislative purpose. (Emphasis added.)

Hearings at 170.

With respect to the assertion that the OCCA outlaws the Tribes' bingo games and, thus, in the tradition of *Rehner*, federal policy should be construed as permissive of State regulation, the legislative history makes clear the OCCA did not, and was not intended to, provide states with a basis upon which to extend their regulatory jurisdiction. As stated in the House hearings, "[The OCCA] would not affect the State enforcement [of anti-gambling laws] at all." *Hearings* at 194 (statement of Asst. Atty. Gen. Will Wilson, U.S. Dept. of Justice). More specifically, in enacting OCCA title VIII, the "Syndicated Gambling" title which contains § 1955, Congress was concerned with eliminating a major source of organized crime revenue. *See* 116 Cong. Rec. H35294. The expansion of the jurisdictional reach of federal enforcement efforts was deemed the most effective solution to the growing problems of syndicated crime and bribery of state and local officials. *See, e.g.*, 116 Cong. Rec. S591.

With § 1955, Congress acknowledged that due to corruption of state officials and limited enforcement resources, states were unable to adequately control syndicated gambling activities. *See* H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4028-30, 4064; 116 Cong. Rec. S604.

The obvious is stated to note that the state gambling laws assimilated into federal law by § 1955 are state *criminal* laws, *only*. That is—§ 1955 is a federal criminal statute; it carries penalties of a $20,000 fine and/or five-year prison term for violations. Through the OCCA, Congress took aim at organized criminal entities engaged in large-scale syndicated gambling activities. *See, e.g.*, H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4029. As a corollary, and in contrast to Appellants' position, Congress was not concerned with lending federal assistance to the enforcement of state civil laws regulating permissible gambling activities.[11]

That Congress intended to assimilate only state criminal gambling laws in § 1955 is underscored also by the wording of § 1955's OCCA companion provision, § 802(a), codified at 18 U.S.C. § 1151.[12] Section 1151 makes a federal crime a conspiracy "to obstruct the enforcement of the *criminal laws* of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." (Emphasis added.)

In sum, the OCCA cannot be construed as authorizing the State to regulate the Tribes' bingo games or otherwise

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[11] For example, Congress expressly exempted from § 1955 bingo games and lotteries conducted by charitable organizations. 18 U.S.C. § 1955(e). *See Hearings* at 170. Appellant State of California permits such organizations to conduct bingo games pursuant to state regulations. *See* Cal. Const. art. IV, § 19(c).

[12] The legislative history of the OCCA describes §§ 1955 and 1511 as "parallel." *See* H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4029-30.

divest the Tribes of their immunity from the state civil regulatory laws on their reservations. Thus, for this reason as well, the conclusion must follow the Tribes may conduct their bingo games free of the State's bingo regulation because Congress has not derogated the Tribes' historic tradition of immunity from such laws.

C. The Relevant Federal Laws To Be Read Against the Backdrop of Tribal Sovereignty in this Case Make Clear That California Has Exceeded Its Lawful Authority in Attempting to Regulate the Indian Tribes' Bingo Games.

The analysis of the relevant federal laws which further define the limits of State power must begin with the laws and executive orders that set aside the Morongo and Cabazon reservations. Those laws and orders are identical in relevant respects to the treaty provisions setting aside the reservation in *McClanahan*, which the Court held pre-empted the extension of state law to Navajo Indians on their reservation. In *McClanahan*, the Navajo treaty provided, *inter alia*, that the prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians." 411 U.S. at 174. Employing the canon of construction in federal Indian law that doubtful treaty expressions are to be resolved in favor of the Indians and recognizing the tradition of Indian independence from state control, the Court in *McClanahan* concluded that the reservation of lands for the use and occupancy of the Navajo Tribe was meant to establish those lands as within the exclusive sovereignty of the Navajo Tribe and the federal government. 411 U.S. at 174-175.

Similarly, here an established tradition of Indian immunity from state control has been shown. *See* Part B above. Moreover, the federal law setting aside the Morongo and Cabazon reservations, as in *McClanahan*, evinces Congressional intent to set aside lands for Indian

use free of state control, especially when read in light of the canon of statutory construction in federal Indian law requiring that statutes passed for the benefit of Indians be construed liberally in their favor. *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. at 2403-2404.

Specifically, the Cabazon original reservation was set apart for the "permanent use and occupancy" of the Cabazon Indians. *See* Executive Order of May 15, 1876. In 1891, Congress authorized the permanent setting aside of reservations, *inter alia*, for the Cabazon and Morongo Indians, employing executing language which even more clearly than the treaty language in *McClanahan* establishes those reservations as free of state control over the Indians there. More specifically, in Section 3 of "An act for the relief of the Mission Indians in the State of California," 26 Stat. 712 (1891), Congress declared reservations for, *inter alia*, the Cabazon and Morongo Bands of Mission Indians ". . . for the *sole* use and benefit of the band or village." (Emphasis added.)

For two reasons, Amici assert the foregoing enactments evince clear Congressional intent to set apart the reservations in this case free of State control over the Indians there. First, in 1891, when the reservations at issue here were set aside, State and non-Indian/tribal relations at best were hostile. Those hostilities are described fully in, *inter alia*, a "Report of Special Agent John G. Ames in Regard to the Condition of the Mission Indians of California, With Recommendations, Wash. D.C., October 28, 1873" in "Papers Accompanying the Report of the Commissioner of Indian Affairs, 1873", wherein Agent Ames noted:

> The Indians . . . accuse the whites of driving them from their lands and wresting them from their homes, in violation of every principle of justice, protesting their unwillingness to submit longer to such treatment, and their purpose to take matters into their own hands unless the whites desist from

> their encroachments or the Government protects them in their rights. *Id.* at 34.

See also, Report of the Secretary of the Interior, November 1, 1883; Report of the Commissioner of Indian Affairs, 1875; *Kagama*, 118 U.S. at 381-82. Thus, the historical record indicates that the Tribes insisted and Congress intended the Reservations to be set aside exclusive of State jurisdiction over the Indians occupying them.

Second, in 1891, a tradition of tribal sovereign immunity from state jurisdiction was acknowledged widely. *See Kagama*, 118 U.S. at 382-384. Accordingly, Congress presumably intended to preserve that tradition in setting aside the Cabazon and Morongo Reservations in the absence of unequivocally-stated contrary intent. That contrary intent is not evidenced in the relevant history. H. R. Rep. 3251, 51st Cong., 2d Sess. (1891). Thus, the conclusion must follow that the Cabazon and Morongo Reservations were set aside for Indians free of State jurisdiction.

Should any doubt remain as to whether the reservations in this case were established free of State control over the Indians there, that doubt should be removed by the mere existence of P.L. 280, completely apart from whether P.L. 280 is a grant of the jurisdiction asserted by the State here. In other words, as this Court noted in *McClanahan* at 411 U.S. at 178, Congress surely would not have established so elaborate a means for state acquisition of jurisdiction over certain on-reservation conduct of Indians if, as asserted by Appellants here, the State could acquire jurisdiction over Indians instead simply by enacting legislation unilaterally.

In sum, the relevant laws in this case, against a backdrop of Indian immunity from state control, make clear that California is prohibited explicitly under federal laws from regulating the Indian tribes' conduct of bingo games on their reservations.

D. Congress Plainly Has Not Consented To California's Regulation of Indian Tribes' Conduct of Bingo Games on Their Reservations.

As discussed earlier in Subsection B, and more fully in the brief of other Amici in this case, no federal law authorizes the state regulation of Indian or tribally-operated bingo games on Indian reservations in California. Moreover, under federal law Indian conduct of bingo games on California Indian reservations is not even a federal offense. Accordingly, since Congress has not plainly divested the Tribes of a relevant aspect of their immunity from state control or repealed the Mission Relief Act (which must be construed as prohibiting California from regulating the activities of the Indian Tribes on their reservations), state jurisdiction clearly does not lie in this case. *See, e.g., Rehner*, 463 U.S. at 719-720; *McClanahan*, 411 U.S. at 171; *Montana*, 105 S. Ct. at 2405.

II. FOR PURPOSES OF ARGUMENT, EVEN IF THE PARADE OF HORRIBLES DESCRIBED BY APPELLANTS WERE TO OCCUR IN THE ABSENCE OF STATE REGULATION, APPELLANTS' REMEDY PROPERLY IS LEGISLATIVE RATHER THAN JUDICIAL.

A. The Record Shows Neither A Vacuum In Law Enforcement Nor Evidence of Organized Crime in the Indian Tribes' Bingo Games.

As the Ninth Circuit in this case observed, no evidence whatsoever exists that organized crime has infiltrated the Indian bingo games at issue.[13] 783 F.2d at 904. More-

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[13] Moreover, the record in this case contains absolutely no evidence that organized crime has infiltrated Indian bingo games anywhere. *Cabazon*, 783 F.2d at 904. *See also*, "Prepared Statement of Victoria Toensing, Deputy Assistant U.S. Attorney General, Criminal Division before House of Representatives Committee on Interior and Insular Affairs, Concerning Various Acts to Regulate Gambling on Indian Reservations, November 14, 1985"; 131 Cong. Rec. S4124 (daily ed. April 4, 1985) (statement of Sen. DeConcini).

over, even if unlawful conduct were to occur at the Indian bingo games, both tribal and federal laws, and certain state laws incorporated under federal law, are available to ensure such conduct is thwarted. *See, e.g.*, Federal Enclaves Act, 18 U.S.C. § 1152 (1982) (extending the laws applicable in other federal reservations to Indian territory); *Williams* v. *United States*, 327 U.S. 711 (1946) (construing 18 U.S.C. § 1152); 25 U.S.C. § 81 (1982) (requiring the Secretary of the Interior to review and approve certain contracts with Indian tribes).

B. Even *Assuming Arguendo* Appellants Encounter the Parade of Horribles They Evidently Anticipate, Proper Respect for Tribal Sovereignty and Congress' Plenary Power Over Indian Tribes Requires that Appellants Seek a Legislative, Not a Judicial, Remedy.

Congress has been held to have plenary power over Indian tribes. *See generally Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States* v. *Kagama*, 118 U.S. 375 (1886). In the exercise of that power, Congress can act quickly and decisively to remedy problems involving Indians on their reservations. Indeed, in light of that broad Congressional authority over Indian affairs, this Court itself has observed that its role in adjusting relations directly implicating Indian tribes' sovereignty on their reservations correspondingly is restrained. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978).

Moreover, Congress, through hearings and committee deliberations, is best equipped to consider limitations on tribes' immunities in response to complaints by non-Indians. Tribes nationwide, with federal executive branch support, conduct bingo games which are important sources of governmental revenues in light of declining federal funds and the virtual absence of any tax base on their reservations. As this Court has observed, the ability of Indian tribes to finance their own governments is a keystone of general federal Indian policy. *See, e.g., Kerr-*

McGee Corp. v. *Navajo Tribe of Indians*, 105 S. Ct. 1900, 1904 (1985) (". . . the Navajos can gain independence from the Federal Government only by financing their own police force, schools and social programs. See President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983)"). These Tribes, therefore, are entitled to careful consideration as to whether they should be divested of their right to conduct bingo as a means to raise essential governmental revenues in the Indian territory free of state regulation which would limit those revenues drastically. Accordingly, Amici urge that if Appellants encounter the parade of horribles they evidently anticipate, they must take their complaints to Congress for careful consideration, rather than ask this Court to depart so radically from its established principle of restraint by emasculating tribal sovereignty at the outset. *See, e.g., Kerr-McGee Corp.*, 105 S. Ct. at 1904 (1985).[14]

CONCLUSION

The only question presented to this Court is whether Congress has repealed the Indian Tribes' immunity from California's civil/regulatory laws, including its bingo laws, which immunity Congress confirmed in the Act setting aside the Tribes' reservations. The State can show no such repeal. Accordingly, the State's attempt to regulate the Tribes' games in this case is federally-pre-empted. Appellants, therefore, must turn to Congress for authority, in the future, to regulate the Tribes' bingo games.

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[14] Indeed, Congress has pending before it two proposals for the regulation of gaming activities on Indian reservations. The House of Representatives on April 21, 1986, approved H.R. 1920. The Senate Select Committee on Indian Affairs on September 18, 1986, completed markup of a bill to regulate Indian gaming.

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OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,
Appellants

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ONEIDA INDIAN NATION OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF THE CABAZON AND MORONGO BANDS OF MISSION INDIANS OF CALIFORNIA

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INTEREST OF AMICUS CURIAE

The Oneida Indian Nation of New York has a significant interest in affirmance of the holding of the Ninth Circuit Court of Appeals that state and local gambling laws do not apply on Indian reservations. Application to the Oneida Nation of the gambling laws of the State of New York, which essentially permit only small stakes games of chance by licensed religious, charitable or non-profit organizations, would be contrary to the freedom from federal and state governments which the Nation historically has enjoyed. Moreover, prohibition of gambling on the Oneida territory would be fatal to the Nation's recently revitalized economy. The Oneida's bingo games, which are managed and operated totally by members of the Oneida Nation, are virtually the sole

source of revenue and employment on the territory and allow the traditional Oneida people complete independence from federal, state, and local financial assistance.

The Oneida Indian Nation is a sovereign nation which has as its principal home the Oneida Indian Territory, located in Madison County, New York. It is a member nation of the Houdenosaunee or Six Nation Iroquois Confederacy.[1] The sovereignty of the Oneida Nation and the other nations of the Confederacy is recognized and guaranteed against interference by the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the Treaty of Canandaigua of 1794 (7 Stat. 44).

The Oneida Nation has a special interest in this case because the Nation is subject to federal statutes that are similar in content to Public Law 280, the scope of which is at issue here. These statutes, 25 U.S.C. §§ 232 and 233, purport to grant general criminal jurisdiction and certain limited civil jurisdiction over Indians on reservations to the State of New York. Section 233 purports to confer upon the courts of New York jurisdiction in civil actions and proceedings between one or more Indians and any other person to the same extent as in other civil actions and proceedings as defined by the laws of New York, with some notable exceptions.[2] Like the civil

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[1] The other five constituent nations of the Confederacy are the Mohawk, Onondaga, Seneca, Tuscarora and Cayuga nations.

[2] Briefly stated, those exceptions are: (1) any recognized tribe could enact prior to September 13, 1952 its own tribal laws and customs which upon certification to the Secretary of Interior "shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue"; (2) Indians exercising hunting and fishing rights granted by agreement, treaty, or custom are not subject to state licensing requirements; (3) Indian lands are not subject to state or local taxation, nor can they be subject to execution on a state court judgment; (4) the statute shall not be construed as authority for alienation of Indian lands; and (5) the state courts do not have jurisdiction in civil actions involving Indian lands or land claims which relate to events prior to September 13, 1952. 25 U.S.C. § 233.

component of Public Law 280, Section 233 has been interpreted to mean that New York has jurisdiction only over private civil litigation involving reservation Indians in state courts.[3] Moreover, the civil jurisdiction conferred by Section 233 has been narrowly construed by the state courts of New York in favor of tribal sovereignty. *See, e.g., Bennett v. Fink Construction Co.*, 47 Misc.2d 283, 262 N.Y.S.2d 331 (Sup. Ct. 1965). It is not properly construed as authority for New York to apply its state and local gambling laws on the Oneida territory.

If this Court reverses the decision of the Court of Appeals, the State of New York might use this Court's decision as authority to invoke 25 U.S.C. §§ 233 and/or 232[4] to regulate or prohibit gambling on the Oneida Indian Territory.[5]

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[3] Throughout its legislative history, the bill is described as one "to confer jurisdiction on the courts of the State of New York with respect to civil actions between Indians or to which Indians are parties." Senate Report No. 1836 (June 15, 1950), House Report No. 2720 (July 24, 1950), and Conference Report No. 3040 (August 31, 1950).

[4] 25 U.S.C. § 232, which purports to confer general criminal jurisdiction over Indians to the State of New York, should not be construed as authority for state regulation or prohibition of gambling on the Oneida territory because New York's gaming laws, like those of California, are essentially civil/regulatory rather than criminal/prohibitory in nature, under the analysis of *Seminole Tribe of Florida v. Butterworth*, 491 F.Supp. 1015 (S.D. Fla. 1980), *affirmed*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020, 102 S.Ct. 1717 (1982), *Oneida Tribe of Indians v. Wisconsin*, 518 F.Supp. 712 (W.D. Wisc. 1981), and *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929, 103 S.Ct. 2091 (1983). Games of chance including bingo are not generally prohibited by New York as contrary to public policy, but are specifically authorized, subject to certain restrictions, by the State's Constitution at Article 1 § 9, and statutes enacted pursuant thereto. In short, New York has chosen to regulate rather than to entirely prohibit bingo.

[5] The Nation notes that the States of Arizona, Nevada, and New Mexico in their brief as *amici curiae* in support of the State of

ARGUMENT

Application of New York's Gambling Laws to the Bingo Operation of the Oneida Nation Would Seriously Undermine the Nation's Interest in Self-Government by Depriving the Nation of Revenue Needed for Essential Governmental Services

Since October 1985, the Oneida Nation has conducted bingo games for profit at a bingo hall located on its territory. The games are managed and operated solely by members of the Oneida Nation. The bingo operation employs no non-Indian consultants or managers; nor does it have any non-Indian investors. No federal, state or local funds were used in its establishment.

The bingo operation has, since October 1985, reduced the unemployment rate for Oneidas residing on the territory from eigthy percent to less than five percent. It employs about ninety people, mostly Oneidas, and generates a weekly payroll of about $17,000. As such, it is one of the largest employers in Madison County, New York.

The considerable profits from bingo are virtually the sole source of income for the Nation.[6] The territory does not have any known natural resources which could generate revenues for the Nation. The net proceeds of the bingo games have been used only to operate the Nation's government and to provide to the Oneida people the kinds

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California argue that the Ninth Circuit's decision "should be held invalid as to P.L. 280 States as well as invalid and, even if not valid as to such States, inapplicable in non-Pub. L. 280 States." Brief at p. 10.

[6] The Nation's only other source of income is a small smoke shop operated in the bingo hall. Most of its customers are patrons of the bingo hall.

of services and programs normally provided by state and local governments. The Nation has, with its bingo profits, installed fire alarm systems in every home, erected a traffic signal, provided garbage disposal services twice a week, and resurfaced the territory's roads and driveways.

The money also has been used to provide badly needed human and social services to its members, including a recreation program for its children, a program to teach the native Oneida language, and the construction of a Nation Council House. One particularly impressive use of the bingo money has been to provide scholarships for ninety percent of those Oneidas attending college and trade school. The Nation can now proudly say that any enrolled Oneida, of any age, who wants to attend college or trade school can do so with Nation funds. In the future, the Nation intends to use its bingo proceeds to build a daycare center and an elementary school for its children, housing for its senior citizens, and a health care clinic for all its members, to provide health care insurance to all its employees, and to establish cooperative farming on the territory.

In short, the bingo project has revitalized the Oneida economy, dormant for more than a century, in less than one year. For years, the traditional Oneidas struggled to maintain their financial independence from federal, state, and local government. Now, because of bingo, they are able to be self-sufficient. In this regard, the Oneidas are a successful example of the current federal policy of encouraging tribal self-government and promoting Indian economic development.

In his Statement on Indian Policy, issued January 24, 1983, President Reagan said:

> It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their

> self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development . . . This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

Statement by the President: Indian Policy, The White House (January 24, 1983). The President's Statement acknowledged that "The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country," and that "Past attempts to stimulate growth have been fragmented and largely ineffective." *Ibid.*

The Interior Department has sought to implement the President's policy by actively opposing any proposed federal legislation that "would subject Indian individuals, Indian organizations, and tribal governments to state laws with regard to licensing, regulation or prohibition of gambling on Indian reservations." Memorandum from Assistant Secretary of the Interior regarding Tribal Gambling Activities, issued March 2, 1983. As explained by this policy directive:

> Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983 . . . A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purposes enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced.

CONCLUSION

In summary, affirmance of the decision below is vital to maintenance of the sovereignty of the Oneida Nation as well as to the future of its fledgling economy. Application of the gambling laws of New York to the bingo operation of the Oneida Nation would be inconsistent with, and would seriously undermine, the sovereign status of the Nation recognized by treaty, the delicate balance of federal, state and Indian jurisdiction in New York State created by 25 U.S.C. § 233, and the policy of the Administration to foster self-government and economic growth by Indian tribes.

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A Bill to Establish Federal Standards and Regulations for the Conduct of Gaming Within Indian Country and for Other Purposes, 1986: Hearings on S.902 Before the Senate Select Committee on Indian Affairs, 99th Cong., 2d Sess. (1986) 9

Cohen, *Handbook of Federal Indian Law* (1982 ed.) 7

Indian Service Population and Labor Force Estimates, January 1985, Bureau of Indian Affairs 4

President Reagan's Policy Statement, January 16, 1983 5

INTEREST OF AMICI CURIAE

The tribes submitting this brief are a representative cross-section of federally-recognized Indian tribes. Without exception, their resources are limited and the needs of their people in terms of health, education and employment are great. Most occupy lands that have scarce or nonexistent natural resources and are located in rural or semi-rural areas. As a consequence, the opportunities for economic development on their reservations are severely limited.

A few of the *amici* tribes have formed and are operating tribal bingo enterprises. Some are presently considering bingo as a means of raising badly needed tribal governmental revenues and of generating reservation employment. A significant number, however, have neither initiated, nor do they intend to initiate, tribal bingo operations. For these tribes, this decision is primarily based on geographic factors making tribal bingo operations economically unfeasible, or on a tribal decision to pursue other alternatives for economic development. However, all of the *amici* tribes share a common and overriding interest in the outcome of this litigation: to protect and preserve their right to initiate, conduct and regulate tribal governmental activities on lands that have been expressly set aside for their use and benefit. All of the *amici* tribes are, therefore, acutely aware that tribal self-government and economic development, and not simply Indian bingo, are the "high stakes" at issue in this case.

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SUMMARY OF ARGUMENT

I

California and the *amici* states seek to deny the Tribes the very right that they themselves freely exercise—the

right to raise revenue through the operation and regulation of gaming. Yet tribally-operated bingo games neither interfere with a state's ability to raise its own revenue, nor impose any involuntary tax or other regulatory burden on non-Indians. Nor does any federal law or policy authorize the States to make such a severe intrusion into tribal self-government. Federal law and policy in fact encourage this very kind of tribal economic development.

II

California believes it has the right to dictate to tribes and directly control the kinds of economic development enterprises they may develop. This is completely contrary to federal law and the decisions of this Court. Absent express delegation from Congress the States have no authority over Indian reservations. That authority instead rests in the tribes or the Federal government. Tribal authority is paramount unless expressly taken by Congress or, in rare instances, found lacking by implication from tribes' dependent status. Congress has not delegated to the States any authority over tribal bingo enterprises operated on reservation tribal trust land. Nor has Congress taken such authority away from the Tribes.

III

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court interpreted Public Law 280 as only a limited grant of jurisdiction to the States, which did not include regulatory jurisdiction. This Court has recently reaffirmed the correctness of the *Bryan* analysis of Public Law 280. *See Three Affiliated Tribes v. Wold Engineering*, 476 U.S. —, 90 L.Ed.2d 881, 106 S.Ct. 2305 (1986) [hereinafter *Three Tribes II*]. Numerous lower federal courts have correctly applied that analysis in rejecting state regulation of tribal bingo.

California argues that its bingo law is not merely regulatory in nature, but rather prohibits tribal high stakes bingo as a matter of public policy. But California not only generally permits the operation of bingo games, it also sanctions a multimillion dollar lottery and other forms of high stakes gaming. And, since the Tribes regulate their own games with federal assistance, the State's claimed policy against "unregulated" high stakes gaming is not impaired.

IV

California's reliance on this Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983), is equally unavailing. Unlike the unique circumstances in *Rice* concerning regulation of liquor, there is in this case no similar federal statute supporting a tradition of exclusive state regulation of gaming on reservation. Furthermore, the so-called "tradition" analysis, advanced by the State for determining whether tribes have traditionally regulated a particular activity, was recently rejected by this Court in a similar context. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985).

ARGUMENT

I

TRIBES ARE ENGAGED IN GAMING OPERATIONS FOR THE SAME REASONS AS STATES.

What is fundamentally at stake in this case is the right of Indian tribes to raise revenue in the same way the States do—through the conduct and regulation of gaming. Prior to *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), the States had always assumed that they had a monopoly on the raising of revenue through lotteries and the taxation of gambling receipts. This is no small advantage.

In the area of lotteries alone, the various states generate huge sums of money. Maryland, for example, has generated net proceeds of over $3.8 billion since starting their lottery in 1973. The District of Columbia has generated net proceeds of over $77 million since starting their lottery in 1982. (See Chart, Appendix A.) These huge revenues are in stark contrast to most tribal games which are much more modest in scope. The Amicus Oneida Tribe runs what is considered to be a large tribal game, but nets only about seven million dollars annually. *See infra* at 12.

All of the *amici* states, except Utah and Mississippi, permit some form of legalized gaming (*see* Chart, Appendix B). While California professes to be "morally opposed to high stakes bingo," their moral abhorrence in this area does not prevent them from running the nation's largest and richest lottery nor does it prevent them from licensing, sponsoring and profiting from pari-mutuel betting on high stakes horse racing. *Id.*

Most Indian tribes govern reservations having few resources which can feasibly be developed. Consequently, the unemployment rate can and does run shockingly high. Recent labor force statistics show reservation Indian unemployment running from 30% (Texas) to 79% (Wyoming). *Indian Service Population and Labor Force Estimates*, January 1985, Bureau of Indian Affairs.

Despite the often crippling economic situation faced by most tribes, Congress has recently passed numerous statutes which have had the net effect of increasing the financial demands on tribal governments. Statutes such as the Indian Self-Determination Act, 25 U.S.C. §§ 450 *et seq.*, have encouraged tribal self-reliance by enabling tribes to assume control of services and programs. The federal government has also promoted economic develop-

ment on reservations by providing financial assistance to Indian tribes and individuals through the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543, which is aimed at stimulating tribal economic, social and governmental development. *See also,* Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7871 (1983); Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* (1978); Indian Civil Rights Act, 25 U.S.C. §1301, *et seq.* (1968). The federal policy encouraged by these laws is also supported by the Executive Branch. *See* President Reagan's Policy Statement, January 16, 1983.

At the same time that Congress has increased the Tribes' self-governing responsibilities, it has reduced the monies available to run their governments. Under these circumstances, it has become clear that the Tribes can only realize independent government in practice by developing their own sources of revenue. States, such as California and the *amici* states, have determined that some forms of gaming are acceptable and have set up various means to raise governmental revenue using this approach. The Tribes have merely done the same.

California and the *amici* states seek to deny tribes the very right that they themselves freely exercise. Yet tribally-operated bingo games neither interfere with a state's ability to raise its own revenue, nor impose any involuntary tax on non-Indians. Nor does any federal law or policy authorize the States to make such a severe intrusion into tribal self-government.

Tribal governments must look to their own meager resources to assure economic and political self-sufficiency. This Court has recognized the vital roll that revenue-raising must play in the strengthening of tribal governments. Institution of gaming on reservations as a means to raise

tribal revenue is a political decision that tribes have made. Most state governments have reached this same conclusion. This Court must not throttle tribal initiative to preserve a state revenue-raising monopoly.

II.

ABSENT CONGRESSIONAL DELEGATION OF POWER TO THE STATES, INDIAN TRIBES RETAIN EXCLUSIVE JURISDICTION TO REGULATE ON-RESERVATION ACTIVITY.

A. Indian Tribes are Subject to State Control Only upon Congressional Delegation.

This Court has long respected the independent status of Indian tribes. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Despite the modification, in light of the changed circumstances of the status of tribes, it is still the law that " . . . tribal sovereignty is dependent upon and subordinate to, only the Federal government, not the states." *State of Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980); *Rice v. Rehner, supra* at 719.

Recent decisions by this Court have recognized two separate and related barriers to assertions of on reservation state authority; "Congressional authority and the semi-independent position of Indian tribes." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Rice v. Rehner, supra* at 718-19.

Congress has plenary authority over tribes and can use that authority to reduce the inherent sovereign powers of tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68 (1903); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818, 824, 105 S.Ct. 2447 (1985). Congress must, however, state its intention

to abrogate tribal authority clearly or the intent must be manifest from the surrounding legislative history. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968); *DeCoteau v. District Court*, 420 U.S. 425, 447 (1975); Cohen, *Handbook of Federal Indian Law* 223, 282-83 (1982 ed.).

The status of tribes as semi-sovereign entities cannot be ignored by the Court. While their independent power has sometimes been referred to as a "backdrop," nevertheless, the powers of an Indian tribe are ". . . *inherent powers* of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added); *United States v. Antelope*, 430 U.S. 641 (1977).

Absent a federal statute which delegates power to the States, the inherent power of Indian tribes generally to govern their reservations remains inviolate. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-180 (1973); *Williams v. Lee*, 358 U.S. 217, 219 (1959); Cohen, *supra*, at 267-275.

B. The Authority of Tribes to Regulate Reservation Activity is Well Established.

It is well established that tribal authority to regulate matters involving on-reservation conduct (either Indian or non-Indian) which directly affects a tribe and/or its members is entitled to the strongest protection from state interference. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). This is particularly true in the area of taxation where this Court has recently noted, "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . ." *Confederated Tribes*, *supra* at 152. The principle that Indian sovereign authority sur-

vives absent a clear legislative extinguishment is especially strong in the area of tribal taxing authority. "[F]ederal laws to date have not worked a divestiture of Indian taxing power." *Id.* The Court has recently upheld the rights of tribes to tax transient, non-traditional, non-Indian activity that takes place on the reservation. *Kerr-McGee Corporation v. Navajo Tribe of Indians,* 471 U.S. —, 85 L.Ed. 2d 200, 107 S.Ct. — (1985); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). This Court has also held that tribal interests are strongest "... when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the Taxpayer is the recipient of tribal services." *Confederated Tribes, supra* at 157.

Lastly, this Court has recognized that Indian inherent sovereign authority is compelling when the on-reservation activity directly affects tribal ability "to govern their membership." *Williams, supra* at 220. These cases establish that Indian tribes retain general civil regulatory control when the activity in question significantly involves tribes or their members while on their reservation, or when exclusive tribal control is necessary to preserve tribal governmental functions in the face of state action that "infringes on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220; *Confederated Tribes, supra* at 152.

1. Bingo Involves On-Reservation Activity That Directly Impacts Tribal Government And Tribal Members.

Each of the *amici* tribes which conducts bingo does so on land held in trust by the United States. Indeed, under the reasoning of *Seminole Tribe v. Butterworth, supra,* and its progeny, high stakes bingo is possible only because the games are occurring within a tribe's Indian country. Tribes which conduct bingo operations directly are heavily involved in the day to day operation of the game. Many

have made extensive financial commitments to the game and have secured BIA loans to finance their businesses. Generally, the proceeds from the bingo games are dedicated to tribal government operations or services, besides providing employment opportunities for tribal members.

The bingo operation of the Leech Lake Band of Chippewa Indians of Minnesota is not atypical. The Tribe has secured a $250,000 grant from the Department of Housing and Urban Development, a $650,000 guaranteed loan through the Bureau of Indian Affairs, and has committed $453,000 of its own tribal monies to achieve the $1.3 million financial package that was necessary to build the bingo hall and to secure the necessary equipment. *A Bill to Establish Federal Standards and Regulations for the Conduct of Gaming Within Indian Country and for Other Purposes,* 1986: Hearings on S.902 Before the Senate Select Committee On Indian Affairs, 99th Cong., 2d Sess. (1986). (Statement of Hartley White). The Tribe manages the operation itself. The bingo hall was constructed with the tribe's own construction company. The games employ 65 tribal members, nearly all of whom are Indian. The net income from the game is earmarked as follows: 50% for general governmental support, 30% for constituent services and 20% to provide various health, education and welfare benefits. *Id.*

Tribes take a significant financial and political risk when they decide to run bingo games. The tribal council must decide whether their community favors the conduct of such activity within the reservation. Tribal members must also be convinced that the games are being run fairly and that the profits are being put to good use. If the reservation voters are not convinced of the worth of keeping the operation, they have the power to vote out of office those who permitted the practice and to elect tribal mem-

bers who have a mandate to address the causes of dissatisfaction.

This is true whether tribes manage their own operations or oversee the performance of a management company. Ultimately, the tribal council is seen by the tribal membership as the entity that is responsible for how the game is run.

2. Tribes Generate Value From Their Bingo Games.

There is value being generated by the conduct of the bingo games. The value is entertainment. People come to the reservation to be entertained by the prospect of gradual, though not often complete, progress toward a goal of winning a large amount of money for a comparatively small investment.[1]

Obviously, most players who participate in the bingo games do not win. They are, rather, entertained by the prospect of winning and derive satisfaction from the process and not the profit derived from the enterprise.

Unlike *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Coufederated Tribes, supra*, which involved a simple buy/sell transaction, the bingo games entail a complex process where people come to the reservation to participate in an activity which provides recreation and has obvious intrinsic value to the participants.

There is a good deal of planning and skill that must be employed. The types of games must be varied to ensure continued interest. The value of the games and other

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[1]At the bingo games conducted on the Santa Ynez Reservation, for example, patrons are charged $20-$60 for bingo cards which enable them to play from 15 to 21 regular games having a potential payoff ranging from $500 to $1000 a game. Special "big jackpot" games can pay anywhere from $1000 to $25,000. Door prizes such as cars, etc. are not unusual.

prizes must be maximized while, at the same time, ensuring an adequate return on investment. Safety for the players, their winnings and property must be assured. The games must be run on time and without error. There must be obvious and effective procedures to ensure that the games are both perceived and in fact are run in an honest fashion. The entertainment value derived from bingo is difficult to consistently achieve and is a far cry from the simple smoke shops involved in *Moe* and *Confederated Tribes, supra*. There is, in short, tangible value generated from the gaming activity of tribes.

3. Bingo Is A Legitimate Method Of Raising Tribal Revenue And Is Exempt From State Interference.

The attached Appendix A shows the number of states that conduct a state run lottery.[2] Each state which conducts state sponsored gambling dedicates the use of that revenue to governmental purposes. Many simply funnel these monies to the state's general fund, but often states have earmarked those funds for specific governmental activities, such as education, senior citizen programs or economic development. (Appendix B.)

Each of the lottery states has set up administrative agencies to run their games and have passed comprehensive legislation to govern the conduct of the games. *Id.* The lotteries raise revenues for governmental purposes

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[2]As further shown by Appendix A, these revenues are considerable, range from a low of $5.2 million to a reported high of $1.3 *billion* dollars. None of the states running lotteries prohibit out of state citizens from playing their game. In fact, such participation is actively sought. Recently, three states (Maine, New Hampshire and Vermont) have joined into one combined lottery for the express purpose of enticing their respective citizens to play their lottery rather than the larger and more lucrative New York lottery.

through the voluntary involvement of players from both within and without the states. In essence, a state lottery is simply a voluntarily assumed tax which results in an increase in state revenue.

Tribal bingo operates in a similar manner. Tribes have dedicated their revenue from bingo to provide governmental services. *Amicus* Oneida Tribe of Wisconsin, for example, reported that of a tribal fiscal year 1986 budget of $34 million, bingo revenue directly accounted for $7.2 million. This money was spent on a variety of projects including education, elderly assistance and economic development. Hearings on S.902, *supra*. (*See* Fact Sheet Supplied by Oneida Tribe of Wisconsin.) Hartley White, Chairman of the Leech Lake Chippewa Tribe has stated to Congress that the $163,427 in bingo receipts was divided 50% to general support, 30% for services and 20% to supplement tribal health, education and welfare. *Id.* (*See* Statement of Hartley White.)

State legislatures have made the determination that gambling is an acceptable method of generating governmental revenue. Indian tribes frequently have weak economies and are heavily dependent upon federal monies. Like the state legislatures, Indian tribes have determined that gaming is an acceptable method of funding tribal activity. Gaming income provides many tribes with their only opportunity to become economically independent from the federal government.

In all cases, the Tribes have passed tribal regulations which govern the conduct of the games. Like the state lotteries, tribal bingo provides badly needed revenue which is derived from residents and non-residents alike through voluntary participation in government-conducted gaming.

III

PUBLIC LAW 280 DOES NOT AUTHORIZE STATES TO REGULATE BINGO GAMES OPERATED BY INDIAN TRIBAL GOVERNMENTS ON TRIBAL RESERVATION TRUST LAND.

California argues that it has the right under the authority of Public Law 280 to directly control tribal government-operated bingo games on Indian reservations. The essence of California's argument is that Public Law 280 authorizes States to comprehensively regulate Indian tribes on reservation trust land. If California's interpretation of Public Law 280 is accepted, it would mean in effect that Congress has delegated a substantial portion of its plenary power over Indian tribes to the States. Public Law 280 has never been, and cannot be, so broadly read.

A. California's bingo statute is a civil regulatory law, and therefore may not be applied to tribal bingo under the authority of Public Law 280.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court interpreted Public Law 280 as not authorizing a state to impose its civil regulatory laws within Indian country.[3] The Court specifically held that state civil regulatory laws were not included within Public Law 280's grant of jurisdiction. *Bryan*, 426 U.S. at 384, 387, 388, 390.[4]

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[3]While the Act expressly grants limited criminal and civil jurisdiction to the States, it nowhere states that state laws may be applied to tribes. Public Law 280 cannot be construed as conferring state jurisdiction over Indian tribes. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976); *Three Affiliated Tribes v. Wold Engineering (Three Tribes II)*, 476 U.S. —, 90 L.Ed.2d 881, 894-895 (June 16, 1986) (quoting from *Bryan, supra*).

[4]Although *Bryan* involved a tax law, the unanimous Court viewed it as one of a class of regulatory laws. *Id.* at 390. This view of tax laws is firmly grounded in the Court's decisions. *See Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 425-427 (1937) (Upholding tax on chain stores as regulatory meas-

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Since *Bryan*, lower federal courts have developed a test for determining when a state law is civil regulatory for purposes of Public Law 280. The need for such a test is clear. Without some kind of inquiry into the purpose and effect of a state law, a state that has assumed Public Law 280 jurisdiction could label a civil regulatory scheme as "criminal", attach a criminal penalty for its violation, and apply it on an Indian reservation. By disguising a regulatory scheme in prohibitory "clothing" a state could easily frustrate the Congressional purpose. Even *amici* states agree that such a subterfuge is not permitted under Public Law 280. Brief of *Amici* Minnesota at 23; Brief of *Amici* Washington, et al., at 11. Indeed, this Court has identified this potential problem in a similar context. *See, Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389 n.8 (1944).

1. The civil/regulatory-criminal/prohibitory test is a necessary and proper method for determining whether Public Law 280 authorizes state law to be applied on an Indian reservation.

This "civil/regulatory-criminal/prohibitory" test adopted by the courts looks at whether or not the state's public policy, as expressed through its laws, *generally* permits or *generally* prohibits, a particular kind of conduct or

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ure designed to adjust competitive inequalities experienced by local stores). Although the tax measure in *Bryan* may have been of a revenue-raising rather than a regulatory kind, there was no reason why the Court's decision should have distinguished the source of the taxing power in determining the intent and effect of the law itself. The *Bryan* case required the interpretation of a federal statute. In deciding what Congress intended to include within the term "civil laws of the State", the Court necessarily reached the question of the Act's scope. Therefore, the Court's reference to civil regulatory laws was necessary to the holding, and was not *dictum*. *See*, e.g., *Florida Central R.R. Co. v. Schutte*, 103 U.S. 118, 143 (1881).

activity. An exception or two alone does not remove a statute from the prohibitory framework. *See*, e.g., *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) (State fireworks laws); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (State casino gambling laws). The more exceptions, however, the more likely the law will be found to be regulatory rather than prohibitory, because it evinces a public policy which generally allows, rather than prohibits, the conduct or activity. *See*, e.g., *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Seneca-Cayuga Tribe v. Oklahoma*, — F. Supp. —, Nos. 85-C-639-B, 86-C-393-B (N.D. Okla., June 5, 1986).[5]

The civil/regulatory-criminal/prohibitory test has been roundly criticized by California and the *amici* states Yet it is no different than any other appropriate judicial inquiry into legislative purpose. In other words, it looks to the general purpose underlying the legislative scheme. *See*, e.g., *Bryan*, *supra*; *Three Tribes II*, *supra*, 90 L.Ed.2d 881, *in passim*, and at 895. This is not to suggest that the test is a simple one or that it is easy to apply in every case. Nevertheless, the difficulty of the inquiry does not justify abandoning the effort. The alternative tests sug-

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[5] Several *amici* states argue that the test is unworkable, and they cite to examples such as murder and traffic laws. The test applies equally well to these other areas. An "exception" to murder, e.g., self-defense, does not transform the general criminal prohibition into a regulatory scheme. Murder is generally prohibited, and the few "exceptions" there are do not make it less so. Traffic laws, on the other hand, may be more regulatory in nature, since states generally permit and license the operation of motor vehicles, subject to certain limited exceptions.

gested by *amici* states do not afford a better approach to determine whether a state law properly is within the scope of Pub. L. 280. The test is necessary and, as presently constituted, provides adequate guidance to the courts.

2. California's bingo statute is civil regulatory for purposes of Public Law 280.

California distinguishes tribal bingo from state licensed bingo by calling the former "high stakes, unregulated" bingo. It is this high stakes, unregulated bingo that state law prohibits, says California. And, since high stakes unregulated bingo is prohibited as a matter of state public policy, the state statute is a criminal prohibitory law, and Public Law 280 applies.

Even if California's premise is accepted—that state law prohibits high stakes, unregulated bingo—its conclusion, that public policy therefore prohibits it, does not necessarily follow. To determine the general state legislative purpose, one cannot focus narrowly on the bingo law alone. Instead, one must examine the state's policy on high stakes gambling in general. Does California generally permit high stakes gambling or does it generally prohibit it?

What the legislative scheme reveals is that California permits high stakes gambling. It runs a state-wide multimillion dollar lottery, and regulates high stakes betting on horse races at State sanctioned tracks. These high stakes games are played at will by Californians and by non-residents, providing substantial revenues for State government. So it cannot be said that California *prohibits* high stakes gambling. Although high stakes *bingo* is not permitted, it is not for the reason that high stakes gambling will unavoidably attract organized crime—otherwise,

California would not permit other forms of high stakes gambling. The reason is that only *unregulated* high stakes gambling is prohibited. It is significant to note that California does not argue that high stakes *regulated* bingo is against its public policy. Indeed, it cannot make that argument. Not only does California permit other forms of high stakes gaming, it actively participates in their operation. California concedes that concern over the unregulated nature of the games is at the heart of its public policy. *See* Appellant's Brief at 40.

What California argues is that its public policy prohibits the kind of bingo games operated by Indian tribes because they are unregulated, high stakes gambling. Without regulation, it argues, the high stakes nature of the games will attract organized crime.

However, California's characterization of tribal bingo games as "unregulated" is simply incorrect. The games are directly regulated and operated by the Tribes themselves, with the assistance of the Federal government. As such, the tribal games are regulated in the same manner as the State regulates other forms of high stakes gaming. The only difference is in *who* does the regulating.

Since the tribal games are regulated by the Tribes themselves, there is no conflict with the State's public policy. What this reveals is the State's real interest—being the *exclusive* regulator of high stakes gaming on Indian reservations. Yet the State offers no justification for why it, and not the Tribes, should have this exclusive right.

The result sought by the State would require a ruling that tribes may not engage in or regulate activities which, although they do not violate state public policy, the State has chosen not to engage in or regulate. Such a result would reduce tribes to complete dependence on a

state's will for their survival, making them "little more than 'private, voluntary organizations,' *United States v. Mazurie*, 419 U.S. 544, 557 (1975)", *Bryan v. Itasca County*, 426 U.S. at 387-388, and would effectively diminish federally created Indian reservations without express Congressional action. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Bryan* at 393.

"The . . . jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws. . . ." *Three Tribes II, supra*, 90 L.Ed. 2d at 893. "This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance." *Id.*

> Pub. L. 280 certainly does not constitute a "governing Act of Congress" which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance.

Id. at 894.

B. Even if Public Law 280 does apply to Tribes, State bingo statutes like California's are expressly excluded from the Act's coverage.

California characterizes its statute regulating bingo as a criminal law, in part because of the law's location within the State's Penal Code. Whether construed as such, or more properly viewed as a civil regulatory law, *see* discussion *supra*, it is excluded from the coverage of Public Law 280 by the express terms of the Act itself.[6]

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[6]The language of sections 2(b) and 4(b) read as follows:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the

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Both sections 2(b) (state criminal laws), 18 U.S.C. §§ 1162(b), and 4(b) (state civil laws), 28 U.S.C. § 1360(b), expressly exclude from the Act any state laws that seek to regulate the use of Indian trust property "in a manner inconsistent with" federal law.[7] The bingo games California and other States seek to regulate are conducted on land held in trust for the Tribes by the United States under the authority of the Mission Indian Relief Act, 26 Stat. 712 (1891). Land is held in trust for many other tribes under authority of the Indian Reorganization Act, 25 U.S.C. § 476 (IRA). These Acts, and numerous other Federal laws, are intended to encourage and promote tribal self-government and economic development.

To permit the States to restrict the operation of tribal bingo games on tribal trust land would directly impede

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United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein." 18 U.S.C. § 1162(b) and 28 U.S.C. § 1360(b).

[7]The language in section 4(b) of Public Law 280, which is identical to that in 2(b), has been interpreted by the courts. In *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), county zoning and building ordinances were found inapplicable to an Indian reservation because they were "inconsistent" with federal statutes promoting improvement of Indian housing, in that they "impeded", "detracted from", or "hindered" programs funded or administered under those statutes, 532 F.2d at 668, and because they were inconsistent with Secretarial regulations adopted pursuant to federal statute, *Id.* at 665, 666; *see also* 25 C.F.R. 1.4. State laws have also been found, under Public Law 280, to be inconsistent with tribal exercise of powers under the Indian Reorganization Act, *Quechan Tribe v. Rowe*, 350 F. Supp. 106 (S.D. Cal. 1972), *aff'd and remanded*, 531 F.2d 408 (9th Cir. 1976), and with Secretarial regulations, *Metlakatla Indian Comm. v. Egan*,

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and hinder the Congressional purposes for which these laws were enacted.[8]

IV.

RICE v. REHNER IS NOT CONTROLLING IN THIS CASE.

A. The Tribal "Tradition" Analysis Of Rice Is Not Applicable To The Question Of Whether P.L. 280 Vests The States With Authority To Regulate Tribally-Operated On-Reservation Gaming Activities.

In *Rice v. Rehner, supra,* this Court interpreted 18 U.S.C. § 1161, a federal statute which specifically addressed the subject of liquor licensing and distribution in Indian country. In essence, the Court held that § 1161 withdrew the absolute federal prohibition against the sale and distribution of liquor in Indian country in favor of joint tribal and state jurisdiction. *Id.*, 463 U.S. at 728. The Court's statutory analysis in *Rice*, which focused on the history of extensive federal intervention in the Indian liquor trade, is not appropriate to an analysis of tribal regulatory authority over gaming activities under Public Law 280.

(Continued from previous page)

369 U.S. 45, 56-57 (1962). *Compare also, New Mexico v. Mescalero Apache Tribe,* 426 U.S. at 334 ("State jurisdiction is preempted by the operation of federal law if it *interferes with or is incompatible with federal and tribal interests reflected in federal law . . .*") (Emphasis added).

[8]Analysis under the express exclusions of sections 2(b) and 4(b) does not require the balancing of tribal, state and federal interests. Therefore, the state interest is not relevant. However, even if the state interest were applied to Public Law 280, the availability of tribal and federal regulation of tribal bingo games, together with the federal and tribal interests in promoting tribal economic development, outweigh any state interest in preventing the possible intrusion of organized crime. "In sum, the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case. *See Rice v. Rehner,* 463 U.S., at 719." *Three Tribes II,* 476 U.S. at —, 90 L.Ed.2d at 895 (O'Connor, J., writing for the Majority). *See also,* generally, *New Mexico v. Mescalero Apache Tribe, supra.*

First, Public Law 280, unlike § 1161, does not speak to specific subject matter (e.g., liquor, gaming, etc.) in which a tradition of tribal immunity from state regulatory power is particularly relevant, but is a qualified grant of jurisdiction to the States in the general areas of criminal and civil jurisdiction.[9] In the absence of a federal statute, analogous to § 1161, which specifically addresses the subject area of gambling on Indian reservations.[10] there is no legal basis for restricting tribal regulatory power over on-reservation gaming activities based on the alleged lack of a tribal "tradition" of engaging in high stakes bingo.

Second, in the absence of such a "narrow context," as existed in the area of liquor regulation in *Rice*, any inquiry into tribal tradition must broadly focus on Indian tribes as governmental entities vested with the inherent authority to engage in the full range of governmental functions. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). To define tribal sovereignty by reference to a static concept of tradition would foreclose all activities except those which could be specifically documented as an element of tribal historical tradition or culture.[11] Moreover, to do so would

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[9]Also, in 28 U.S.C. § 1161 Congress *expressly* delegated to both the Tribes and the States a share of the exclusive federal power to regulate Indian liquor trade. *Rice*, 463 U.S. at 728-729. The limited grant of civil jurisdiction to the States in Public Law 280 is simply not comparable.

[10]The Organized Crime Control Act, 18 U.S.C. § 1955, is not such a statute. It does not grant any jurisdiction to the States, much less the kind of sweeping regulatory jurisdiction that California is attempting to assert over the appellee tribes.

[11]Neither the States nor the Federal Government would ever advocate such a restrictive test to define the scope of *their* modern-day exercise of inherent governmental powers.

deprive Indian tribes of the ability to exercise their powers of self-government in a modern context, thus effectively denying them access to revenues which serve to advance the federal goal of tribal economic self-sufficiency.

Third, as the Ninth Circuit correctly pointed out, it is not the nature of the particular activity that is controlling, but rather what underlying tribal governmental function is being exercised. *Cabazon Band v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986). Though here the specific activity is high stakes bingo, the governmental function being exercised is that of revenue-raising for the specific purpose of supporting tribal programs and generating badly-needed Indian employment.

Fourth, the Court's inquiry into tribal tradition in *Rice* was motivated by the historical backdrop of comprehensive federal efforts to control the Indian liquor trade, to the exclusion of any inherent tribal authority. In this case, in the absence of such a unique context, the Court's analysis of Public Law 280 in *Bryan v. Itasca County*, *supra*, is controlling. In *Bryan* the Court applied well-established canons of statutory construction in Indian cases, most significantly the canon that state laws generally are not applicable on Indian reservations except where Congress has expressly provided that they shall apply. *Id.*, 426 U.S. at 377. The Court abandoned this assumption in *Rice* only because of the unique history of affirmative Congressional divestment of tribal power over the Indian liquor trade: ". . . that assumption would be unwarranted in the *narrow* context of the regulation of liquor." Emphasis added; *Rice*, *supra*, at 723. In thus refusing to apply the assumption in favor of exclusive tribal authority, the Court in *Rice* concluded that the Indian tribes had been completely divested of "any inherent self-government over liquor regulation." *Id.* at 726.

Thus, the tribal tradition analysis is only appropriate if there is evidence that Congress has divested the Tribes of their inherent authority to regulate specific subject matter. This is not the situation here. The unique context of the *Rice* decision thus serves to narrowly restrict the application of its tribal tradition test.

B. The Ninth Circuit Properly Limited The Holding In Rice To Its Specific Factual And Legal Context.

Rice involved a unique situation where Congress had, as early as the American Colonial Period, completely divested Indian tribes of any inherent regulatory power over liquor, and then, by passage of 18 U.S.C. § 1161 in 1953, had restored what appeared to be a large measure of that power. In analyzing § 1161, it was therefore reasonable for the Court in *Rice* to examine the lack of a tradition of tribal involvement in the specific subject area of liquor. However, tribal gaming activities are different because these activities, and the tribal authority to license or regulate them, have not been subjected to an historical treatment similar to that accorded liquor trade in Indian country.

There is a lack of any evidence in the record to substantiate either a partial or total divestment by Congress of inherent tribal power to regulate on-reservation gaming activities. By contrast, in *Rice*, this Court found that "the tribes have long ago been divested of any inherent self-government over liquor regulation by both the explicit command of Congress and as a 'necessary implication of their dependent status.'" *Id.*, at 726. A similar divestiture in the area of gaming was not found by the Ninth Circuit.

The Ninth Circuit thus found it "unnecessary" to follow the "narrow" analytical focus of *Rice*. Instead, the court stated the test as "whether the tribe is engaged in a

traditional governmental function, not whether it historically engaged in a particular activity." *Cabazon, supra*, 783 F.2d at 906. In the absence of congressional divestment of inherent tribal governmental functions, rules of statutory construction in Indian cases require that Congress expressly provide that the States have jurisdiction to regulate on-reservation gaming activities. Congress has simply not done so.

C. The Federal Courts Have Been Unwilling To Extend The Tribal Tradition Analysis Of Rice Beyond Its Narrow Context.

Consistent with our analysis of *Rice* herein, the federal courts have been unwilling to extend the tribal tradition test beyond its narrow context in *Rice*. To inject a tradition analysis into every conflict between the States and the Tribes over the on-reservation exercise of tribal regulatory power is to invite the defeat of tribal efforts to develop reservation economies, and, thus, to bring about the eventual demise of Indian self-government. The courts have rejected such an unprincipled approach to deciding conflicts between state and tribal regulatory power.

In *Washington v. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985), the court rejected *Amicus* State of California's argument that because Indian tribes had not "traditionally" regulated hazardous waste activities, that *Rice* should be read to authorize state jurisdiction in that area. Instead, the court took a principled position of "respect for the long tradition of tribal sovereignty and self-government" and recognized that contemporary federal policies of encouraging tribal self-government would be effectively thwarted unless tribes could exercise their inherent authority in a modern context to control potential environmental degradation. *Id.*, at 1470-1471. Similarly, in *Quects Band of Indians v. State of Washington*, 765 F.2d 1399

(9th Cir. 1985), vacated and withdrawn on other grounds, 783 F.2d 154 (1986), the court, in determining that the Queets Band possessed the sovereign authority to license and register tribal vehicles (*id.*, at 1403), refused to narrowly focus on the subject matter to be regulated (automobile registration) in determining whether the tribal activity was related to traditional tribal self-government. *See, also, Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *modified* at 665 F.2d 1390 (1982). Obviously, the licensing and registration of automobiles represents an exercise of tribal regulatory power over non-traditional subject matter. Instead, the court held that, unlike the situation in *Rice*, it had "no cause to believe that the tribes have been implicitly *divested* of that power by virtue of their dependent status." *Id.*, at 1403; emphasis added.

Finally, in *Seneca-Cayuga Tribe v. State of Oklahoma, supra* (Slip Opinion, June 5, 1986), the District Court focused not on the tribal activity engaged in (bingo games), but on the underlying governmental function served by the activity, i.e. the traditional governmental function of revenue-raising to support tribal self-government. *Id.*, Slip Opinion at 14-15.

These cases demonstrate that the analysis of whether a particular tribal activity is a valid exercise of a traditional governmental function cannot be narrowly confined to the specific activity or commodity being regulated. To so confine it is to use the tribal tradition test as an arbitrary and formidable, if not absolute, barrier to Indian self-government and economic self-sufficiency. Few commodities marketed in modern society would be considered within the traditional exercise of tribal sovereignty. Tribal civil regulatory jurisdiction over on-reservation activities would thus be constrained by reference to

commodities or activities prevalent on Indian reservations at some arbitrary point in history. The test of tribal "tradition" would vary from tribe to tribe as traditions and culture vary. In essence, the Tribes would be caught in a political, societal and economic time-warp, limited to exerting exclusive civil regulatory authority over only those on-reservation activities and commodities that have existed on Indian reservations since the 18th or 19th centuries.

Viewing tribal tradition without reference to inherent tribal sovereignty and the implicit capacity of tribes to mold and adapt their governmental functions to address the needs of their people in a technologically complex and ever-changing world reveals the unworkable nature of the tradition analysis when applied beyond the narrow confines of *Rice*. It is not only unworkable, it would be devastating for those poorest of the Indian tribes that lack natural resources, such as coal, oil and timber, and which must, if they hope to achieve a fair measure of self-sufficiency, trade in commodities and engage in activities for which there exists a market in the 20th Century.

D. Since Deciding Rice, This Court In An Analogous Situation Has Repudiated The Use Of Judicial Appraisals Of Whether A Particular Governmental Function Is "Traditional" In Determining The Scope Of Governmental Regulatory Authority.

The Court in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 83 L.Ed.2d at 1021, repudiated as "unsound in principle and unworkable in practice" the use of historical tradition as an analytical tool for determining the scope of state regulatory power. The reasons given in *Garcia* for rejecting historical tradition as a basis for analyzing whether activities fall within the

prerogative of the States to regulate are useful in determining here whether such an "unworkable" test should be imposed, as the *amici* states so vigorously advocate, in analyzing the scope of tribal regulatory power.

In deciding to overrule its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court in *Garcia* noted that in the intervening nine years the "federal and state courts have struggled with the task, thus imposed [by the test of *National League of Cities*], of identifying a traditional function for purposes of state immunity under the Commerce Clause." *Garcia, supra*, 83 L.Ed.2d at 1020. Justice Blackmun, speaking for the Majority in *Garcia*, recited a litany of cases wherein courts had grappled with the troublesome task of determining what activities carried out by the States were governmental in nature and therefore beyond the reach of federal regulatory power under the Commerce Clause. *Id.*, at 1025-26. The Court found the distinction between those activities held to be immune, and those that were not, to be "elusive at best." *Id.*, at 1026.

The analysis and language employed by the Court in *Garcia* to disparage the use of tradition as a measure of state immunity are analogous to the present attempt by the *amici* states to relegate tribal governmental power to a situation of suspended animation, caught in a static web of so-called "traditional" functions which, according to the *amici* states, cannot change in content or application to meet the demands made on tribal governments to respond to the changing political, economic and social needs of their people. Such "a *static* historical view of *state* functions generally immune from federal regulation" [emphasis added] had previously been disavowed by the Court in *Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 686 (1982).

The following passages from the *Garcia* opinion are paraphrased, substituting the Tribes wherever the States are mentioned and the States wherever the Federal Government is mentioned. The result is a striking adaption of the *Garcia* Court's disparaging analysis of "traditional governmental function" to the equally problematic tribal tradition analysis of *Rice*.

> The most obvious defect of a historical approach to [tribal] immunity is that it prevents a court from accommodating changes in the historical functions of [tribes], changes that have resulted in a number of once private functions like education being assumed by the [tribes] and their subdivisions. At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for [tribal] immunity is illusory. Reliance on history as an organizing principle results in line drawing of the most arbitrary sort; the genesis of [tribal] governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of [tribal] involvement had to be for [state] regulatory authority to be defeated.

Id., 83 L.Ed. 2d at 1029-1030. Further, that

> Any rule of [tribal] immunity that looks to the "traditional", "integral", or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which [tribal] policies it favors and which ones it dislikes.

Id., at 1031. And, finally,

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of [tribal] immunity from [state] regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional".

Id.

Though state and tribal governments may differ in terms of specific interests or activities engaged in, similarities do exist in the kinds of basic governmental functions that they exercise. Nevertheless, the *amici* states seek in this case to impose a "tradition" test on Indian tribal governments which the States, in turn, would never suffer to be imposed on themselves, and which has been expressly rejected by this Court.

Thus, in addressing California's and the *amici* states' contention that "tradition" should determine whether an activity is a valid exercise of tribal governmental power, the Court should heed the statement of Justice Blackmun:

> Attempts by other courts . . . to draw guidance from this mode [of traditional governmental functions] have proved it both impracticable and doctrinally barren.

Garcia, supra, 83 L.Ed.2d at 1037.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

Existing Lottery States

	Date Began	Gross Sales, in millions (* billions)	Net Proceeds (in millions)	Net Proceeds as % of Total State Tax Revenues	Net Proceeds per Capita	Percentage Change in Net Proceeds, 1984 to 1985 Projection of First-Year Gross Sales	Total Net Proceeds to Date	Where the Money Goes
Arizona	July 1, 1981	$72.9	$22	0.7	$7	-22	approx. $115 million	State transportation fund, 30%; prizes, 46%; lottery administration, 25%
Colorado	Jan. 24, 1983	$105.3	$32	1.4	$10	-22	$115.1 million	State capital construction fund, 16%; state conservation trust fund, 12.8%; state division of parks and recreation, 3.2%; prizes 50%; lottery administration, 18%
Connecticut	Feb. 12, 1972	$344.5	$148.8	4.2	$47	41	$715.7 million	State general fund, 37.4%; prizes, 52.1%; lottery administration, 10.5%
D.C.	Aug. 22, 1982	$112	$35	2.3	$57	40	$77 million	State general fund, 31.7%; prizes, 51.7%; lottery administration, 16.6%
Delaware	Oct. 31, 1975	$38.7	$15	1.9	$24	7	$72.3 million	State general fund, 38.7%; prizes, 50.1%; lottery administration, 11.2%
Illinois	July 30, 1974	*$1.2	$516.8	5.6	$45	38	$1.8 billion	Education, 46.7%; prizes, 50%; lottery administration, 3.3%
Maine	June 27 1974	$15.9	$4.4	0.4	$3	2	$27.7 million	State general fund, 27.7%; prizes, 49.7%; lottery administration, 6%
Maryland	May 15 1973	$881	$250.1	5.7	$58	15	$3.8 billion	State general fund, 38.7%; prizes, 53.6%; lottery administration, 7.7%
Massachusetts*	March 22, 1972	*$1.3	$341.1	5.1	$59	34	approx. $1.5 billion	Cities and towns (for revenue sharing), 34.1%; prizes, $56.1%; lottery administration, 9.8%
Michigan	Nov. 13, 1972	$885.5	$380	4.4	$28	53	approx. $2.1 billion	K-12 education, 40%; prizes, 49%; lottery administration, 11%
New Hampshire	March 12, 1964	$13.7	$4.3	1.0	$4	-25	$189.8 million	Education, 28.3%; prizes, 48.1%; lottery administration, 23.6%

	1970							$2 billion	9%
New York	June 1, 1967	*$1.3	$600	2.8	$34	54		$2.2 billion	Two formulas, depending on game: education, 45%; prizes, 40%; lottery administration, 15%; or education, 35%; prizes, 50%; lottery administration, 15%
Ohio	Aug. 12, 1974	$854.6	$338.6	4.1	$31	35		$1.2 billion	Education, 39.6%; prizes, 49.3%; lottery administration, 11.1%
Pennsylvania	March 7, 1972	*$1.3	$585	5.6	$47	13		$2.5 billion	Senior citizens programs, 43%; prizes, 48%; lottery administration, 9%
Rhode Island	May 18, 1974	$52.3	$18.7	2.1	$19	2		$140 million*	State general fund, 36%; prizes, 50.4%; lottery administration, 13.6%
Vermont	Feb. 14, 1978	$5.2	$1.2	0.2	$2	−8		$8.5 million	State general fund, 25%; prizes, 50%; lottery administration, 25%
Washington	Nov. 15, 1982	$149.5	$51.9	1.1	$12	−24		$200.6 million	State general fund, 40%; prizes, 45%; lottery administration, 15%

*Massachusetts figures are calendar year, not fiscal.

New Lottery States

California	Oct. 3, 1985						$1 billion		Education, 34%; prizes, 50%; lottery administration, 16%
Iowa	Aug. 22, 1985						$114 million		Economic development, 31.5%; prizes, 47%; lottery administration, 21.5%
Missouri	Jan. 20, 1986						$250 million		State general fund, 45%; prizes, 45%; lottery administration, 10%
Oregon	April 25, 1985						$110 million		Economic development, 34%; prizes, 50%; lottery administration, 16%
West Virginia	Jan. 9, 1986						$24 million		Special lottery fund, 40%; prizes, 46.6%; lottery administration, 13.4%

Sources: Population and tax revenue from the U.S. Census Bureau. Tax revenue is for the year ending in June 1985. Other data gathered from state lottery offices by Linda Payton, senior research analyst/librarian for NCSL and Jane Carroll, senior associate editor of State Legislatures. Data analyzed by Steven D. Gold, director of Fiscal Studies for NCSL.

APPENDIX B

STATES	SLOT MACHINE	OFF-TRACK BETTING
Alaska		
Arizona		
Connecticut		Conn. Gen. Stat. § 12-571 (1983)
Florida		
Idaho		
Kansas		
Louisiana		
Mississippi		
Nevada	Nev. Rev. Stat. § 463.160 (1986)	
New Mexico		
North Carolina		
North Dakota		
Ohio		
Oklahoma		
Oregon		
Rhode Island		
South Dakota		
Utah		
Washington		
Wisconsin		
Wyoming		

STATES	BINGO	JAI LAI	CARDROOMS	BLACKJACK	PUNCH-BOARDS	PULL TABS/ JARS
Alaska	Alaska Stat. § 15.15.100(a) (1984)		Alaska Stat. § 18.15.100(b) (1984)			
Arizona	Ariz. Rev. Stat. Ann. § 5-401 *et seq.* (1975)					
Connecticut	Conn. Gen. Stat. § 7-169 (1983)	Conn. Gen. Stat. § 12-574 (1983)				
Florida	Fla. Stat. § 849.093 (1986)	Fla. Stat. § 551.01 *et seq.* (1972)				
Idaho						
Kansas	Kan. Stat. Ann. 79-4701 *et seq.* (1984)					
Louisiana	La. Rev. Stat. Ann. § 33.4861.1 *et seq.* (1973)					
Mississippi						
Nevada	Nev. Rev Stat. § 463.080 *et seq.* (1986)		Nev. Rev. Stat. § 463.080 *et seq.* (1986)			
New Mexico	N.M. Stat. Ann. § 60-2B-1 (1978)					

North Carolina	N.C. Gen. Stat. § 14-309.1 *et seq.* (1985)				
North Dakota	N.D. Cent. Code § 53.06.1 *et seq.* (1985)		N.D. Cent. Code § 53.06.1 *et seq.* (1985)	N.D. Cent. Code § 53.06.1 *et seq.* (1985)	N.D. Cent. Code § 53.06.1 *et seq.* (1985)
Ohio	Ohio Rev. Code Ann. § 3763.01 (Page 1980)				
Oklahoma	Okla. Stat. Tit. 21 § 995.1 *et seq.* (1983)				
Oregon	Or. Rev. Stat. § 465.100 (1985)				
Rhode Island	R.I. Gen. Laws § 11-19-30 (1984)	R.I. Gen. Laws § 41-7 *et seq.* (1984)			
South Dakota	S.D. Codified Laws Ann. § 22-25-23 *et seq.* (1982)				
Utah					
Washington	Wash. Rev. Code § 9.46.030 (1985)			Wash. Rev. Code § 9.46.-030 (1985)	
Wisconsin	Wis. Stat. § 162.02 *et seq.* (1976)				
Wyoming					

STATES	LOTTERIES	HORSE RACING	THOROUGH-BRED RACING	QUARTER HORSE RACING	HARNESS/ TROTTING/ RACING	GREYHOUND RACING
Alaska						
Arizona	Ariz. Rev. Stat. Ann. § 5-501 *et seq.* (1975)	Ariz. Rev. Stat. Ann. § 5-101 *et seq.* (1975)				Ariz. Rev. Stat. Ann. § 5-501 *et seq.* (1975)
Connecticut		Conn. Gen. Stat. § 12-584 (1981)				
Florida		Fla. Stat. § 550.011 (1972)	Fla. Stat. § 550.40 (1972)	Fla. Stat. § 550.33 (1972)	Fla. Stat. § 550.16 (1972)	Fla. Stat. § 550.063 (1972)
Idaho	Idaho Code § 54-2501 (1979)					
Kansas						
Louisiana		La. Rev. Stat. Ann. § 4.141 *et seq.* (1973)				
Mississippi						
Nevada		Nev. Rev. Stat. § 466.010 *et seq.* (1986)			Nev. Rev. Stat. § 466.130 (1986)	Nev. Rev. Stat. § 244.347 (1986)
New Mexico		N.M. Stat. Ann. § 60-101 *et seq.* (1978)				

North Carolina					
North Dakota					
Ohio	Ohio Rev. Code Ann. § 3770.01 *et seq.* (Pg. 1980)	Ohio Rev Code Ann. § 3769.01 *et seq.* (pg. 1980)	Ohio Rev. Code Ann. § 3769.003 (pg. 1980)	Ohio Rev. Code Ann. § 3769.07 (pg. 1980)	
Oklahoma					
Oregon	OR Rev. Stat. § 461.010 *et seq.* (1985)	OR Rev. Stat. § 462.010 *et seq.* (1985)			OR Rev. Stat. § 462.010 *et seq.* (1985)
Rhode Island		R.I. Gen Laws § 41-3-1 *et seq.* (1984)			R.I. Gen. Laws § 462.010 *et seq.* (1984)
South Dakota		S.D. Codified Laws Ann. § 42-7-47 *et seq.* (1982)	S.D. Codified Laws Ann. § 42-7-47 *et seq.* (1982)	S.D. Codified Laws Ann. § 42-7-47 *et seq.* (1982)	S.D. Codified Laws Ann. § 42-7-47 *et seq.* (1982)
Utah					
Washington	Wash. Rev. Code § 67.70 *et seq.* (1985)	Wash. Rev. Code § 67.16 *et seq.* (1985)			
Wisconsin					
Wyoming		Wyo. Stat. § 11-25-101 *et seq.* (1977)			

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No. 85-1708

In The
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE JICARILLA APACHE TRIBE, PUEBLO OF ISLETA, AND PUEBLO OF SANTA ANA AS AMICI CURIAE IN SUPPORT OF THE APPELLEES

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No. 85-1708

In The
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,

Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE JICARILLA APACHE TRIBE, PUEBLO OF ISLETA, AND PUEBLO OF SANTA ANA AS AMICI CURIAE IN SUPPORT OF THE APPELLEES

CONSENT TO FILING

The consent to the filing of this Amicus Brief has been obtained from all of the parties hereto. The written consents have been separately filed with the Clerk of this Court under separate cover letter.

INTEREST OF THE AMICI CURIAE

Amici Curiae, the Jicarilla Apache Tribe, the Pueblo of Santa Ana, and the Pueblo of Isleta, are all Indian tribes within the State of New Mexico. The Jicarilla Apache Tribe has a constitutional form of government under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Jicarilla Apache Tribe operates on its own, a small bingo game run entirely by members of the Tribe, which is open to participation by both members and non-members alike. The Jicarilla bingo game is operated entirely within the Jicarilla Reservation and is not located near any major urban area within the State of New Mexico. Amici Pueblo of Isleta has treaty rights under the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, and is also organized pursuant to the Indian Reorganization Act with its own constitution. The Pueblo of Isleta operates a bingo game solely within the reservation of the Pueblo, utilizing the revenues for essential governmental purposes. The Pueblo of Isleta is located approximately 10 miles south of Albuquerque, New Mexico. The Pueblo of Santa Ana, which is located approximately 10 miles to the north of Albuquerque, operates under a traditional form of government. It too enjoys rights under the Treaty of Guadalupe Hidalgo. The Pueblo of Santa Ana has proposed the utilization of gaming as a means of generating revenue for the essential governmental services it provides. The Pueblo of Santa Ana is currently in litigation with the Secretary of the Interior over issues involved in said proposed gaming activities. *Pueblo of Santa Ana v. Hodel*, No. 85-2688 (D.C. District Court). The outcome of the cause before this Court would directly affect the Constitutional, treaty and statutory rights of these amici tribes.

SUMMARY OF ARGUMENT

Amici urge this Court to reexamine the context in which cases presenting conflicting state, tribal, and federal interests are decided. Amici respectfully suggest that the re-examination of the conceptual framework under the Indian

Commerce Clause of the United States Constitution would be extremely helpful in resolving admittedly difficult questions. On the other hand, the abstract "balancing test" advocated by the State of California will necessarily generate an enormous amount of litigation to determine the continued validity of many treaties, federal statutes intended to benefit Indian tribes, and other federal policies that affect Indian tribes. This needless confusion can be avoided by adherence to long-standing fundamental principles of jurisdiction and the appropriate exercise of authority over Indian commerce by the Congress of the United States. The state interest, so ardently urged upon this Court by the State of California, provides a compelling reason for the exercise by *Congress* of its legislative authority over Indian commerce pursuant to the Constitution. Congress should enact federal legislation that will regulate Indian commerce involving gambling while at the same time take into appropriate consideration other rights which may be affected and which now exist through various federal treaties and statutes affecting Indian tribes.

Amici urge this Court to uphold the Public Law 280 analysis of the Ninth Circuit. However, in the event that this Court should disagree with the Ninth Circuit's analysis, then it is respectfully submitted that a narrow application of Public Law 280 can resolve the issues in the instant case without unnecessarily affecting Indian tribes, such as amici, whose reservations are within non-Public Law 280 states. The right of Indian tribes to self-determination, economic independence, and self-governance, must be viewed from a realistic perspective which necessarily requires that Indian tribes not be unduly constrained in the exercise of their constitutional and treaty rights to engage in commerce - limited only by the Congress of the United States.

The Organized Crime Control Act does not answer the jurisdictional questions which must first be addressed before a determination can be made of the applicability of said Act. Specifically, the Organized Crime Control Act does not in

and of itself authorize the application of state and local gambling laws on Indian reservations, but rather an independent jurisdictional basis is required in order to determine whether particular on-reservation activity is being conducted in *violation* of state laws as contemplated under the Act.

Lastly, this Court should not accept the suggestion of Amici states of Arizona, Nevada, and New Mexico, to re-examine this case in the light of the Assimilative Crimes Act. The Ninth Circuit did not decide this case based on the Assimilative Crimes Act. This Court should, therefore, review the Ninth Circuit's decision on the basis of the issues contained therein.

If Indian tribes are to be allowed to grow and function as federal policies encourage they must be allowed to make their own determinations of what areas of commerce they will engage in and under what circumstances, without being subjected to the requirement of state approval for each proposed tribal endeavor. The United States Constitution reserves that power to Congress.

ARGUMENT

I

THE SUPREMACY CLAUSE PREEMPTS THE APPLICABILITY OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS

A. The Indian Commerce Clause and the Appropriate Analytical Framework.

Amici respectfully submit to this Court that a proper framework is necessary for the examination of the very difficult issues involved in Indian gambling as a legitimate form of Indian commerce. The Constitution provides:

> This Constitution, and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.

U.S. Const., art. VI, cl. 2.

The United States has, since 1871, ceased dealing with Indian tribes through treaties and has since then dealt with tribes by congressional legislation. However, the pre-existing treaties are still valid and binding, and under the Supremacy Clause are part of the law of the land. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Recent examples of the congressional exercise of its power over Indian tribes as provided for in the Indian Commerce Clause, U.S. Const., art I, § 8, cl. 3, include the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450(a-n) (1982) and the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871. In passing the Indian Self-Determination and Educational Assistance Act, Congress declared "its commitment to the federal government's responsibility to the Indian people for the establishment of a *meaningful* Indian self-determination policy which will permit an orderly transition from federal domination." 25 U.S.C. at § 450(a) (emphasis added). It is clearly federal policy to assist Indian tribes in their ability to achieve economic independence. Before an analysis can be made of the competing interests referred to below, Amici urge this Court to utilize the Indian Commerce Clause analysis articulated by Professor Robert Laurence in "The Indian Commerce Clause," 23 Ariz. L. Rev. 203 (1981) (hereafter Laurence). Professor Laurence's commerce clause analysis requires that state interests be examined in the context of the federal policy to keep commerce free from unreasonable burdens and, in some instances, the need for national uniformity. *Id.* at 217.

Professor Laurence suggests the utilization of the tests for interpreting whether state regulation impermissibly interferes with interstate commerce as articulated in *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938). Laurence at 207-08. The four inquiries required under *Barnwell Bros.* analysis are:

> (1) Whether the state regulation discriminates against interstate commerce; (2) whether the state regulation conflicts with congressional legislation; (3) whether the state acted "within its province"; and (4) whether the regulation is appropriately related to the desired ends.

Laurence, *Id.*, Professor Laurence then demonstrates the application of the *Barnwell Bros.* principles of interstate commerce to the Indian Commerce Clause. Amici respectfully suggest that the analytical framework provided by this approach will properly preserve the jurisdictional analyses heretofore articulated by this Court on issues within the scope of the Indian Commerce Clause. The adoption of this approach will assist in the development of a coherent body of federal Indian jurisdictional law. California's abstract "balancing test", by contrast, requires a case by case review driven by the state claimed urgent state interest. Here, Califoria paints a picture of a state about to be overrun by organized crime. Therefore, it urges this court to allow it to control Indian commerce. Such an approach will create jurisdictional chaos.

B. The "Balancing Test" Advocated by Appellee is not a "Particularized Inquiry" Properly Within a Constitutional Framework.

Although Amici do not disagree with the concern expressed by the State of California, the examination of conflicting interests between the State and Indian tribes cannot be done in a vacuum as suggested by Appellee. Rather, the constitutional framework of the Commerce Clause and the "backdrop of Indian sovereignty", *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), will result in a more rationally developed body of law. On the other hand, if the expansive test advocated by California is applied, this Court may inadvertently provide the tool for the abrogation of Indian constitutional and treaty rights which are no longer consistent with state articulated policy. The Supremacy Clause of the Constitution requires more than a test of state convenience

in determining whether constitutional and treaty rights will remain inviolate. Rather, it is for Congress to address the concern articulated by California. Uniformity and coherence in the law will result. Federalism as expressed in the Indian Commerce Clause will be preserved.

1. The Unrestrained Application of an Abstract "Balancing Test" will Destroy Fundamental Principles of Federalism Embodied in the Constitutionally Defined Relationships Between the United States, Indian Tribes, and the States.

The Appellee argues for an unnecessary expansion of this Court's reasoned decision in *Rice v. Rehner*, 463 U.S. 713 (1983). This Court specifically analyzed the affect of the State's interest in *light of the relevant federal statute* which provided for state liquor law applicability to liquor sales on Indian reservations. 18 U.S.C. § 1161. There is no analogous specific statute involved herein. It is therefore important to summarily review the rules of construction applicable to federal laws and treaties as they pertain to Indian tribes as developed by this Court over the years because federal treaties and statutes will be affected if the unrestrained California "balancing test" is adopted.

To carry out and protect the federal policies underlying treaties and federal statutes which are intended to benefit and protect Indians, this Court has developed the following rules to determine the scope of preemption of state laws. First, treaties with Indian tribes are interpreted as the Indians would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *United States v. Winans*, 198 U.S. 371, 380 (1905); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832). Secondly, treaties and federal statues are to be interpreted in favor of retained tribal self-government and tribal property rights against competing claims under state law. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976); *McClanahan v.*

Arizona State Tax Comm'n, supra; Ex parte Crow Dog, 109 U.S. 556, 568-70 (1883). Thirdly, doubts and ambiguities in treaties, or statutes, are resolved in the Indians' favor. *Bryan v. Itasca County* at 392; *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *McClanahan* at 174-76; *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564, 576-77 (1908). Finally, federal Indian laws are to be liberally interpreted for the purpose of carrying out the protective purpose of such laws. *Antoine* at 200; *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926). This court must, therefore, consider the effect of the intrusive policy urged by California in light of these principles because the California policy, if adopted by this Court, must be analyzed with respect to each tribal treaty and federal statute intended to benefit Indians that it affects.

2. If Adopted, California's Abstract "Balancing Test" Will Have Unforeseen and Unnecessary Impact Upon the Continued Validity of Many Federal Treaties, Statutes and Policies.

California argues for a balancing test without the benefit of the appropriate constitutional framework and further asserts the proposition that Congress has never fully determined whether state laws apply on Indian reservations and cite, in support of their proposition, *Rice v. Rehner, supra*, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The proposition that California asserts is neither accurate, nor would it result in a well-reasoned body of federal Indian law were it to be adopted. To begin with, California misstates the preemption analysis to be a mere balancing of interest test and, further, California equates its "balancing test" with the particularized "inquiry" required in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Secondly, it incorrectly asserts the proposition that state laws apply on Indian reservations unless specifically preempted by federal

law. Therefore, the California argument asserts the "balancing test" is used to determine if a state law is *not* applicable. This fundamental flaw in the reasoning employed by California is contradicted by a well established body of law emanating from the Constitution and consistent with the guiding principles posited by this Court over the years. *See generally,* Cohen, *Handbook of Federal Indian Law,* pp. 259-79 (1982 ed.).

This Court has consistently held that the federal purposes of Indian treaties and stautes are broadly preemptive of state law. *Fisher v. District Court,* 424 U.S. 382 (1976); *McClanahan v. Arizona State Tax Comm'n, supra; Williams v. Lee,* 358 U.S. 217 (1959); *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867); *Worcester v. Georgia, supra.* This preemption, because of the operation of the Supremacy Clause, occurs by implication; express language is not necessary to effect that end. *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968); *Arizona v. California,* 373 U.S. 546, 598-601 (1963); *Winters v. United States, supra.* For example, in *McClanahan,* this Court stated that although the "treaty nowhere explicitly states that the Navajos were to be free from state laws or exempt from state taxes", yet the treaty "was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision". *McClanahan* at 174-75. *See also, White Mountain Apache Tribe v. Bracker, supra* at 136. In the preemption, analysis within an appropriate constitutional framework, this Court has looked to the federal purpose involved. For example, where the issue has been the federal purpose to preserve to tribes the means of self-support, it has been held that this federal purpose preempts state laws which would interfere or limit the tribes' exercise and enjoyment of their means of livelihood. *Washington v. Fishing Vessel Ass'n,* 443 U.S. 658 (1979). Each of the tribal Amici is engaged, pursuant to various federal treaties and statutes, and as authorized by Tribal law, in a variety of commercial activity. Their efforts to become self-sufficient are wholly consistent with federal

policy. The constitutionally informed analysis discussed above precludes the utilization of an abstract balancing test suggested by California to determine whether state law constrains the tribal endeavor.

C. The Post-Proposition 13 Era and the Utilization of Non-Traditional Methods to Raise Governmental Revenues.

The California inspired tax reform (Propostion 13) has reverberated throughout the country. As a direct result, many states have looked to alternative means of raising governmental revenues. The device which many, many states have selected as a supplement to traditional taxation has been the state owned and state run lottery. Indian tribes have been affected by the same types of economic considerations that have affected the states. Along with the diminishment of tax revenues, has been a corresponding diminshment of federally funded programs and services. If Indian tribes are to enjoy the same right to economic survival that states enjoy, they too must be allowed to choose supplements to the traditional methods of taxation for raising revenue. This Court has confirmed the right of Indian tribes to exercise their powers of taxation over both Indian and non-Indian alike pursuant to tribally enacted tax programs. *Kerr McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. _____, 85 L.Ed.2d 200 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Cabazon and Morongo Bands, just as the tribal Amici, seek to avail themselves of alternatives to taxation, *just as states have.* Given that tribes have the right to economic survival and self-sufficiency pursuant to federal policies, it is not for the State of California or the State of New Mexico to decide for the tribes within those states what forms of commercial activity are acceptable to the state. These matters fall squarely within the Indian Commerce Clause and are within the exclusive province of Congress. Many states, such as New Mexico, directly own gambling facilities from which they raise governmental revenues. Others, such as Amici State of Nevada, rely on state sanctioned gambling on a

massive scale to generate income to Nevada. It would be constitutionally impermissible to allow such states to dictate to Indian tribes within their borders the type of commercial activity in which such tribes can engage in order to promote the same type of activity in which the state directly or indirectly participates in and benefits from. In other words, the states cannot be permitted to utilize their governmental power to suppress tribal *governmental* activity designed to raise *governmental* revenues for which the state may be competing.

D. The State Interest Articulated by California Makes a Compelling Argument in Support of the Need for Legislation by Congress to Regulate Indian Commerce Involving Gambling; Abandonment of Long-Standing Fundamental Principles of Jurisdiction is Neither Necessary nor Prudent to Address the State Interest.

California, in articulating its vital interests, makes it fairly clear that they seek to impose the states' determinations of morality on Indian tribes and they further seek to avoid the *risk* of organized criminal infiltration. Calif. Br. at 29. The chaos which will result by substituting this type of alarmist concern for the public well-being instead of traditional jurisdictional analyses are obvious. *See generally,* Clinton, "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective", 17 Ariz. L. Rev. 951 (1976); Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503 (1977); Vollmann, "Criminal Jurisdiction in Indian Country," 22 U. Kan. L. Rev. 387 (1974).

The limitation that California suggests that Indian tribes be compelled to adhere to, namely, participation in only "traditional" pursuits (presumably fishing, hunting, and a subsistence level of agriculture) is an unwarranted extension of the use of that term by this Court in *Rice v. Rehner.* Rather, the Court below properly took the view that it is a

traditional function of tribal governments, just as state governments, to provide revenues and engage in activities to generate those revenues for the purpose of fulfilling legitimate governmental functions. To hold otherwise would freeze Indian tribes into subsistence living with respect to their on-reservation activities of the 19th century. That restrictive view of Indian commerce neither comports with constitutional concepts of commerce nor federal policies of Indian self-determination. This Court, therefore, should reject the suggested use of such a narrow test as advocated by the Appellee.

The state interest which California expounds on at length (of concern for the influx of organized crime) is more properly dealt with by Congress. California acknowledges that "the *existence* of organized crime is not relative to the jurisdictional question anyway." Calif. Br. at 29-30, n. 17. *A fortiori*, the *fear of the existence* of organized crime is not relevant to the jurisdictional question either. It is, therefore, essential that this Court reject California's invitation to abandon long-standing and fundamental principles of jurisdiction. As this Court has in the past rejected invitations to "legislate" so too should it do so now. *See, United States v. Kagama*, 118 U.S. 375 (1886).

II

PUBLIC LAW 280 DOES NOT AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS WHERE THE STATE PERMITS BUT REGULATES A PARTICULAR GAMBLING ACTIVITY; IF THE COURT SHOULD DISAGREE WITH THE NINTH CIRCUIT'S PUBLIC LAW 280 ANALYSIS THEN THIS COURT'S RULING SHOULD BE LIMITED TO PUBLIC LAW 280 STATES

California asserts the proposition that California has common law jurisdiction over Indian reservations - as such jurisdiction is defined by its "common law balancing tests". Further, California asserts that Public Law 280 grants it

authority to exercise certain limited civil and criminal jurisdiction over Indian reservations. California concludes with the proposition that argues that Public Law 280 was intended to *broaden* their common law jurisdiction over Indian reservations. Calif. Br. at 33.

Although California cites no authority for its assertion that it had common law jurisdiction over Indian reservations unless expressly preempted, that position is wholly inconsistent with the perceived need for the passage of Public Law 280 which California correctly states only granted to certain states *limited* civil and criminal jurisdiction under certain circumstances. The very reason why Congress determined it to be necessary to pass Public Law 280, was that state laws, as a general rule, were inapplicable to Indian reservations. Cohen, *Handbook of Federal Indian Law*, at 269. This need for federal legislation to grant limited jurisdiction to states over criminal and civil actions within Indian reservations cannot be reconciled with California's other assertion that Public Law 280 was intended to broaden its jursidiction by granting it certain limited jurisdiction.

If California's premise (that its law already was applicable to reservation activity through some sort of federal common law) is accurate then Public Law 280 was wholly unnecessary. Obviously, Congress took a different view. Amici suggest to this Court the better reasoned view of Public Law 280 jurisdiction is that of the Ninth Circuit, and respectfully suggest that its analysis should be followed. It is especially important to note that California seems to clearly indicate that it wishes to use the vehicle of either claimed federal common law jurisdiction or Public Law 280 jurisdiction to impose upon Indian tribes California's notions of morality and requisite conformance to social standards as articulated by the State from time to time. This is precisely the type of intrusion that led Congress to amend Public Law 280 to require tribal consent.

Public Law 280, as orginally passed, gave federal consent to the assumption of limited criminal and civil jurisdiction over Indian territory, and automatically conferred such jurisdiction on certain enumerated states, which included California. Pub.L. 280, Act of August 15, 1953, ch. 505, §§ 2, 6-7, 67, Stat. 588 (§ 2, now codified at 18 U.S.C. §1162 (1982); § 6 replaced by 25 U.S.C. §1323(b) (1982); 7 expressly repealed by Act of April 11, 1968, Pub.L. 90-284, § 403(b), 82 Stat. 73, 79; 25 U.S.C. §§ 1321-26 (1982)). Part of the Indian Civil Rights Act of 1968, added the requirement that consent of the affected tribes by special vote of tribal membership was a necessary condition precedent to the assumption of state jurisdiction over Indian lands 25 U.S.C. § 1321-22. Since this enactment in 1968 no state has obtained tribal consent. Thus, allowing state jurisdiction over Indian reservation gambling as advocated by California would violate the 1968 Indian Civil Rights Act and would vitiate the congressional purpose behind Public Law 280 as amended by that Act. It is worth noting also, from the perspective of the Pueblos of Isleta and Santa Ana, and the Jicarilla Apache Tribe, that New Mexico had an opportunity to assume Public Law 280 jurisdiction and elected not to do so. There were many such states that were reluctant to assume such jurisdiction because of the additional burdens it would impose on states and state court dockets which were perceived to be already burdened. *Williams v. Lee*, 358 U.S. 217, 222-23, n. 10 (1959), *citing*, H.R. Rep. No. 848, 83rd Cong., 1st Sess. 3, 7 (1953); Secretary of the Interior Ann. Rep. (1955) at 247-48; Secretary of the Interior Ann. Rep. (1956) at 215-16; Secretary of the Interior Ann. Rep. (1957) at 253-54. An unnecessarily broad ruling accepting the incongruous argument asserted by the State of California would grant broad jurisdiction to states, such as New Mexico, that elected not to assume such jurisdiction. And, as mentioned, would also violate the rights of Indian tribes under the 1968 Indian Civil Rights Act.

However, to the extent that this Court should determine that Public Law 280, as it applies in California, does grant jurisdiction to California to apply its law to on-reservation activity, such as bingo, then this Court's ruling should be limited to Public Law 280 states. As California points out, there are no treaty tribes in California and the treaty issues, therefore, are not present in the analysis of the instant case. Calif. Br. at 10, fn. 4. Many New Mexico tribes like the Pueblo of Isleta and the Pueblo of Santa Ana are affected by such treaty considerations. The Supremacy Clause questions and concerns which would exist in analyzing the effect of the broad ruling suggested by California present an additional reason to rule as narrowly as possible on this question.

III

THE ORGANIZED CRIME CONTROL ACT DOES NOT, IN AND OF ITSELF, AUTHORIZE THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS ON INDIAN RESERVATIONS; AN INDEPENDENT JURISDICTIONAL BASIS IS NECESSARY TO DETERMINE WHETHER ON-RESERVATION ACTIVITY IS IN VIOLATION OF STATE LAWS UNDER THE ORGANIZED CRIME CONTROL ACT

The recent Sixth Circuit decision in *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986), applied the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, to on-reservation gambling activities. California claims that the Act "by its terms makes state gambling laws applicable on Indian reservations". Calif. Br. at 41. This is not so. The Act does not expressly apply to Indian reservations. It does make certain acts which are violations of state law also a federal crime. But it does not create the jurisdictional predicate California seeks in order for gaming on Indian reservations to be a violation of California law and thus of the Act. There must be an independent basis for California jurisdiction. California essentially asks this Court to adopt this boot strap argument. To belabor the obvious for a moment, does a

gambling operation in the State of Nevada violate California state law and thus, become a violation of the Organized Crime Control Act? The obvious answer to this questions is no, and the reason this is so is because California law does not apply in Nevada. California has no jurisdiction over activities in Nevada even through Nevada gambling activities clearly impact California. Similarly, unless it can be determined that California law applies to gambling on Indian reservations independent of the Organized Crime Control Act, those reservation actions which would ostensibly "violate" California law do not in fact do so and do not constitute a violation of the Organized Crime Control Act simply because the jurisdictional predicate is absent.

California extends its argument to simply untenable lengths when it argues that before an Indian tribe may engage in *any* type of commercial activity or economical development enterprise, it may do so only after Congress has enunciated a policy that expressly permits the particular acitivity in question. Calif. Br. at 30-33. While it is true that the Constitution does not expressly grant Indian tribes the right to engage in Bingo to raise governmental revenues, so too is it true that the Constitution does not expressly reserve unto states a right to raise governmental revenue by running state owned lotteries. The Constitution, does by necessary implication, provides for the right of Indian tribes, to engage in commerce, (Const. art. I, § 8, cl. 3) subject to regulation by Congress. That bingo games run by Indian tribes are "commerce" within this Court's many interpretations of the constitutional concept of commerce, is too self-evident a proposition to allow for serious disagreement. The Organized Crime Control Act quiet simply does not afford the State of California jurisdiction to impose its laws on Indian Commerce Clause reservation activity which might otherwise be a violation of State law were California to be possessed of jurisdiction over the activity at issue.

Moreover, the very existence of federal statutes such as the Organized Crime Control Act, and the Racketeer

Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68, are strongly suggestive of two things with respect to organized crime and racketeering. First, states have historically been impotent to effectively deal with organized criminal activity. Secondly, the problem of organized crime is really a national problem which requires federal legislation and law enforcement. This reality compels the conclusion that the appropriate and constitutionally required arena for a resolution of Indian gambling and the attendant potential problem of organized criminal activity is the Congress of the United States.

IV

THE NINTH CIRCUIT'S DECISION DID NOT CONSIDER THE APPLICABILITY OF THE ASSIMILATIVE CRIMES ACT, 18 U.S.C. § 13, AND THIS COURT SHOULD REJECT THE INVITATION TO DO SO AS SUGGESTED BY AMICI CURIAE ARIZONA, NEVADA, AND NEW MEXICO

The brief of Amici States of Arizona, Nevada, and New Mexico, filed herein in support of the State of California, discusses at great length the history of the Federal Assimilative Crimes Act, 18 U.S.C. § 13. Ariz Br. at 9-28. This Court should, nevertheless, decline the invitation to review this case in light of the Assimilative Crimes Act as the Ninth Circuit did not decide the case on that basis. As that Act was not the basis of the decision below, tribal Amici think it appropriate for this Court to refrain from analyzing the issues in light of that Act. In fact, the tribal Amici would agree with the views of Arizona, Nevada, and New Mexico, that any ruling on the merits of this case should be narrowly drawn so as not to inadvertently impact upon the very separate issues with which these Amici Curiae tribes are involved vis á vis the State of New Mexico. *Id.* at 28.

CONCLUSION

The problems presented by the State of California with respect to the legitimate concerns for the state interest in organized crime are compelling reason for immediate

attention and action by the Congress of the United States pursuant to its plenary authority over Indian affairs. Those reasons advocated by the State, however, are not adequate to depart from long-standing and well-reasoned principles of jurisdiction within the constitutional framework of the Indian Commerce Clause, and traditional rules pertaining to federal preemption and the sovereign rights of Indian tribes.

Amici Curiae tribes strongly urge this Court to avoid embarking on the uncertainties which would be attendant to the adoption of an unrestrained "balancing test" as advocated by the State of California. The treaty rights, constitutional rights, and federal statutory rights affecting Indian tribes would be thrown into a state of uncertainty by the adoption of such an ill-conceived "test". This Court has always firmly ground its decisions regarding the jurisdiction of states over affairs on Indian reservations on fundamental principles of the Supremacy Clause of the Constitution. To the extent that a balancing test has been employed within the framework of the Supremacy Clause, then effects on federal laws and policy and infringement on the rights of Indian tribes to self-determination and self-governance have been the next levels of inquiry.

Indian tribes should not be precluded from engaging in various forms of commerce intended to provide th tribes with needed revenues to provide legitimate governmental services. Indeed, the Indian Commerce Clause of the Constitution contemplates just such activity. For these reasons, this Court should affirm the ruling of the Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, et al.,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, et al.,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE TULALIP TRIBES OF WASHINGTON, THE SOBOBA BAND OF MISSION INDIANS, THE LaJOLLA BAND OF MISSION INDIANS, AND THE TRINIDAD RANCHERIA

AS AMICI CURIAE
IN SUPPORT OF THE CABAZON AND MORONGO TRIBES

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Order Granting Defendants' Motion for Summary Judgment (August 14, 1984), State v. Hatch , et al. , W.D. Wash. No. C83-1518R...

INTEREST OF AMICI CURIAE TRIBES

A. The Tulalip Tribes of Washington.

The Tulalip Tribes of Washington is a federally recognized Indian Tribe, and a successor in interest to tribes and bands that signed the Treaty of Point Elliott, 12 Stat. 927 (1855). The Tribe occupies a reservation consisting of approximately 22,000 acres in a predominantly rural area of Snohomish County, Washington. Its governing body functions under a federally approved constitution and bylaws, adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. (476. Through the Indian Reorganization Act and other federal laws and policies, the United States has supported the commitment of tribes to self-determination and economic develpment. President Reagan has reaffirmed the unique government to government relationship

between the United States and tribes, and the federal interest in strong tribal governments. At the same time, his administration has encouraged tribal governments to explore alternative ways of revenue raising and economic development as federal financial assistance to tribes is sharply decreased. President Reagan's Indian Policy statement (January 24, 1983). Faced with similar cuts in federal financial assistance, states like Washington have turned to government run lotteries. In Washington State, local governments and charitable organizations are permitted to raise substantial revenue by regularly running bingo games, and certain other gambling activities.\1

1. Such gambling activities, when run by governments have traditionally been considered a form of voluntary taxation, and a legitimate revenue raising mechanism. See, State and Local Taxation, 20 Wayne L. Rev. 611, 645 (1974); Clark v. Mayor and Alderman of the City of Washington, 25 U.S. (12 Wheat) 40, 53-54 (1827); Karafa v. New Jersey State Lottery Commission, 128 N.J. Super. 499, 324 A.2d 97, 100 (1974). Regarding the broad taxing powers of tribes

(Continued on next page)

Several years ago, with a loan from the Bureau of Indian Affairs of nearly $1 million dollars, and a loan of approximately $2 million from a private financial institution, the Tulalip Tribe established a reservation entertainment center on tribal trust land. There, the tribal government operates bingo, pull tab, and punchboard games. All profits go to the government's general operating fund and have enabled the Tribe to continue some of the badly needed social services which otherwise could no longer be provided. In addition, the Center has trained and employed a substantial number of tribal members and their families in food service, management, and other required skills, providing jobs on a reservation where

---

(Footnote 1 continued)
as to tribal transactions with non-Indians from outside the reservation, see, Washington v. Confederated Tribes, 447 U.S. 134, 152-154 (1980).

unemployment has hovered around 45-50%.

Several years ago, the Washington State Gambling Commission litigated the question of whether certain Washington state law restrictions applied to the tribe. State v. Hatch, et al., W.D. Wash. No. C83-1518R. In 1984, the federal district court, in a carefully reasoned opinion, concluded:

> ...RCW 9.46.030 authorizes bingo and pulltab operations by a wide variety of charitable and nonprofit organizations... The Washington statute regulates bingo as a money making venture by limiting the location and number of days of operation, requiring that all proceeds be applied to the organization conducting the game and prohibiting the use of professional managers other than members or employees of the organization. RCW 9.46.020(2). Pulltabs are regulated by limiting the price at which they may be sold. RCW 9.46.110.
>
> * * *
>
> [P]rofits received by the Tribe from the bingo and pulltab activities are to be invested for the betterment of the Indian community...while the Tulalip Tribe may not qualify as a charitable organization within the letter of the Washington gambling statute and the Tribe's gaming

> operation does not fully comply with all requirements of the statutory scheme, the Tulalip Tribe can be said to fall within the spirit of the state's permissive intent.

Id., Order Granting Defendants' Motion for Summary Judgment (August 14, 1984) p. 10 (copy appended). The State's appeal to the Ninth Circuit was dismissed as untimely, and there has been no further litigation in Washington State over tribal bingo.\2

---

2. There has been federal enforcement as to isolated instances of Indian casino gambling. In U.S. v. Lummi, the federal government distinquished tribal bingo operations:

> Washington State, as Farris holds, and as we have discussed above, has a strong prohibition policy against professional gambling. Professional gambling includes such activity as bookmaking, blackjack, craps, etc., and is virtually either totally prohibited, or limited to one narrow exception, the fund raising event, popularly known as "Reno night". Bingo, on the other hand, is permitted to be played weekly by bona fide charitable or non-profit organizations under certain conditions. The same constraints apply to both the Reno night and to bingo in regard to the nature of the organization which can conduct the

(Continued on next page)

In the Tulalip case, the State Gambling Commission asserted a fear of organized crime infiltration. However, its concerns are contrary to the views of local law enforcement familiar with the tribal operation. In commenting on the various tribal gambling bills being considered by Congress, the Snohomish County Sheriff wrote:

> July 2, 1986
>
> Senator Mark Andrews, Chairman
> Senate Select Committee on Indian Affairs
>
> Dear Senator Andrews:
>
> I write this letter concerning the Tulalip Tribes of Washington's gaming enterprise located on the Tulalip Indian Reservation in

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(Footnote 2 continued)
activity, but the nature of the activity which can be engaged in is very different.

Memorandum of the United States in Support of Plaintiff's Motion for a Preliminary Injunction, United States v. Lummi, No. C83-946 (W.D. Wash. 1983) at 33-34.

Snohomish County, Washington for the due consideration of the Senate Select Committee on Indian Affairs now considering H. R. 1920, S.902 and S.2557.

I am personally and professionally acquainted with the management and operation of the Tulalip Bingo and pull tab gaming conducted at the Tulalip Bingo Center.

The Tulalip Indian Reservation is a PL280 reservation and as Sheriff of Snohomish County I am the chief law enforcement officer responsible for investigation of crimes committed by or against Tribal members on the reservation.

The controls, checks and balances established by the all tribal mamagement has resulted in a gaming operation, in my opinion, free from outside or corrupt influences or practices. It is a well run and "clean" enterprise.

The security of the facility and the gaming public is adequately protected and includes off-duty members of my department. I might add that from the inception of planning and the final construction of the entertainment center, both sides have worked in a cooperative spirit to make sure that this operation remained free and clear of all outside influences that represent gambling interests, and both parties agree that these policies have afforded the protection and safety provided by the Sheriff and the image and integrity for the Tulalip Tribes.

I would urge that all due consideration and respect for tribal gaming in the nature of bingo, pull tabs and punch board run by Tribes themselves be afforded by the committee in its consideration of the various legislative proposals. Thank you.

Sincerely,

/s/
Robert M. Dodge
Snohomish County Sheriff

The Tulalip Indian Reservation has been plagued by extremely poor economic and living conditions, which the tribal government has been committed to alleviating. Through its general funds, the tribal government has operated a variety of social services, including mental health, medical, dental, and alcohol treatment programs, a reservation headstart pre-school facility, public school busing, higher education scholarships, garbage collection, fire protection, recreational programs for senior citizens and children, and other services. The tribal government

is also committed to increasing employment opportunities on the reservation through a coordinated program of economic development. However, economic development has been limited by the scarcity of exploitable natural resources, and lack of adequate funds. The Tribe has a small logging operation, but has had to rely primarily for tribal revenue on leasing tribal lands to non-Indians, rather than developing reservation lands itself because of its limited financial resources.

In the early 1980's, as the Tribe faced increasing and drastic cuts in federal and state support for reservation services, it needed to find other revenue sources for a number of services, such as a nurse practitioner position, a health administrator position, a health administrator position, a health planning position, orthodontic services, certain mental health services, and its alcohol treatment program. The Tribe explored a

possible tribal shopping center development, but was first stymied by the refusal of sewer and water services from the nearby City of Marysville, which feared the potential economic competition to Marysville businesses, and then by a down turn in the general economy limiting the proposed shopping center's potential. After considering a variety of economic development opportunities, the tribal government, with substantial financial assistance from the Bureau of Indian Affairs, developed a program to develop tourist and recreational opportunities on the reservation. In June 1983, the Tribe opened the Tulalip Entertainment Center. In addition, a nearby hotel/restaurant complex has been constructed on tribal trust land.

The only gambling activities permitted at the Tulalip Entertainment Center are bingo and pulltab games. The facility is

operated pursuant to a tribal ordinance, which was reviewed and approved by the Secretary of Interior, and which prohibits any private gambling operation on the Reservation. No personal profit making from the bingo and pulltab games is permitted, and all revenue goes to operation costs, debt retirement, and the tribal government's general fund. The Tribe operates the facility without any outside management company. The Tulalip Entertainment Center manager is a tribal member who received training in accounting and business under the GI Bill, served as an Assistant Tribal Business Manager for the Tribe from 1959 through 1963, and as the Tribal Business Manager, from 1963 to 1978. The Tulalip Entertainment Center has 93 employees, 69 of whom are tribal members, 12 whom are spouses of tribal members, and 6 of whom are from other tribes. The 6 other employees are non-Indians with no affiliation with the

Tribe or its members. They work in non-managerial capacities, such as bingo number callers, food servers, pulltab selling, and security.

Before opening the Tulalip Entertainment Center, the Tribe employed a former chairman of the Washington State Gambling Commission to assist in establishing a tightly controlled, well run program. The personnel, particularly the top management, were subject to tribal background checks, including the checking of FBI records, for links with organized crime or other criminal activities. All employees are carefully trained, to insure tight security. The Tribe spent substantial sums on sophisticated equipment, including 18 cameras, tv monitors, a direct centralized computer accounting of cash register transactions, and a special security room with a round-the-clock security patrol. Off-duty

Snohomish County police are employed to assist the Tribe in patrolling the facility on weekends and evenings.

The Tribe selected the operation of bingo and pulltab games because they have been extremely successful and widely used as means of raising funds for charitable purposes in Washington State. According to State records, produced in the Hatch case, in FY '82, statewide gross receipts from bingo, pulltab and punch board games were $89,747,976.00 from bingo, and $125,103,942.00 from punch board and pulltabs. In 1981, there was 57 bingo operations in Snohomish County alone, which generated gross receipts of $9,495,905.00, and 671 bingo licenses throughout the State. State bingo licensees paid prizes in excess of $68,000,000.00 in 1982 (in excess of $7,000,000.00 in Snohomish County) and had net income in excess of $8,000,000.00 ($865,612.00 in Snohomish County). Until recently, the Washington

State Gambling Commission placed no dollar limit on gross revenues to a single organization from bingo, pulltabs and food services. Single facilities, such as Big Brothers in Spokane, Washington, grossed $4,300,000.00 in 1982 from such operations. State regulations now limit each bingo operations' revenue to annual gross receipts of $3,500,000.00. In its first year of operation, Washington State's recently established lottery generated $66,700,000.00 for the State General Fund.

B. Soboba Band Of Mission Indians, LaJolla Band Of Mission Indians, And Trinidad Tribe.

The Soboba Band of Mission Indians has a bingo facility which is presently closed. The LaJolla Band of Mission Indians, and the governing body of the Trinidad Rancheria do not have any bingo or other gambling operations on their reservations.

However, all three tribes join in this amicus brief because of their concern with the sweeping and fundamental changes in Indian law principles which California and other states are advocating. Each of these California tribes suffer from exceptionally high unemployment and impoverished reservation conditions. A ruling that states may exercise regulatory authority over them, in the absence of Congressional authorization or under Pub L 280, could have a severe impact on their efforts to improve living conditions and economic opportunities on their reservations. In California, pre-Bryan efforts to assert such regulatory authority highlighted the problems of a wholesale application of state and local laws to reservation Indians. As was pointed out by the Ninth Circuit Court of Appeals in regard to the impact on tribal housing programs and tribal economic development generally,

> ...subjecting the reservation to local jurisdiction would dilute if not all together eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potential hostile, local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 and n. 14 (1975), cert. denied 429 U.S. 1038 (noting that county regulation of state permitted forms of gambling were an example of such concerns).\3

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3. In Bryan v. Itasca County, the Court noted with approval the Ninth Circuit Court of Appeal's concern that state regulatory authority over reservation Indians could serve to channel economic development elsewhere, and further

(Continued on next page)

The amici tribes urge the Court to keep in mind the ramifications of the state's legal position for other tribes and the implications of that position in other state/tribal jurisdictional contexts.

SUMMARY OF ARGUMENT

The focus of this amicus brief is on the question of whether a federal common law balancing test or "Public Law 280" controls the determination of state jurisdiction. The thrust of California's argument is that this Court is free to decide, as a matter of policy, whether a state may legislate the parameters of permissible tribal activity on trust or

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(Footnote 3 continued)
undermine the ability of tribes to improve reservation living conditions. Bryan v. Itasca County, 426 U.S. 373, 388 n. 14 (1976).

restricted lands within the Tribe's reservation. California and its supporting amici attempt to extract sweeping new Indian law principles from this Court's decision in Rice v. Rehner, 463 U.S. 713 (1983). If this Court were to adopt their interpretation of "modern federal Indian law," it would be departing substantially from both its earlier and most recent Indian law decisions.

Rice clearly was not intended to invade the exclusive province of Congress to decide the extent to which states may apply their laws to reservation tribes and their members. In Rice, this Court upheld the imposition of state liquor licensing requirements upon a tribal member "[b]ecause we find that Congress has delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country..." 463 U.S. at 715. The

Court recognized that, although tribes may have lacked self-governing authority over liquor transactions and states may have had concurrent jurisdiction to prevent non-Indians from selling liquor to Indians, a Congressional delegation was necessary "to fill the void" in federal/state law applicable to tribal members once the federal prohibition upon their sales was lifted. Id. at 733.

This traditional immunity of reservation tribes and their members from the application of state laws is well established. It requires careful attention to the identity of the persons and entities against whom a state law is to be enforced. See, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 US 134, 151 (1980). The states have ignored such critical factors in arguing they have residuary jurisdiction over tribes and that this matter may be decided by a balancing test. This Court has ruled that

the application of state laws to tribes in situations such as this is impermissible in the absence of Congressional authorization. Moreover, Public Law 280, 67 Stat. 588, set the parameters for assertions of state jurisdiction over reservation Indians, in the absence of other federal statutes addressing the particular Indian activity involved. As this Court explained in McClanahan v. Arizona Tax Commission, the "modern cases" on state jurisdiction over reservation Indians lock to the applicable treaties and statutes, such as Public Law 280, "which define the limits of state power." 411 U.S. 164, 172 (1973). The Court noted that:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. Organized Village of Kake v. Egan, 369 U.S. 60, 62, 7 L. Ed.2d 573, 82 S. Ct. 562 (1962); Federal Indian Law 846. The question is generally of little more

> than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

Id. at 172 n. 8.

A close examination of Bryan v. Itasca County, 426 U.S. 373 (1976), including the briefs and record in that case, make it clear that the the Court carefully considered its statements regarding Pub L 280's effect on state regulatory authority. Those statements constituted rulings on a critical issue, and were not dictum.

Amici tribes are concerned not only with the implications of the new Indian law principles urged by the states in regard to revenue raising from bingo and similar games. If adopted, the fundamental changes proposed in the scope of this Court's prior rulings can have broad ranging implications beyond the regulation of gambling. Particularly when Congress is aware of

state concerns regarding Indian gaming activities and is considering the need for any change in the current the law, this Court should be hesitant to intrude upon a province that it has traditionally left to legislative determination.

ARGUMENT

I.

WITHIN AN INDIAN RESERVATION, CONGRESSIONAL AUTHORIZATION IS NECESSARY FOR STATES TO REGULATE INDIAN TRIBES

A. In Determining the Applicable Legal Principles, It Is Critical To Identify At The Outset To Whom The State Law Is To Be Applied

The California and county laws at issue are laws governing operators of bingo and card games. The players are not violating any specific state or local law by their participation in the games. Although the appellee tribes may have utilized non-Indian owned management companies, they

explain in their brief why this does not alter the fact that the tribes are the operators of the games. In terms of whether a common law balancing test can determine the applicability of these laws in this case, the fact that the subject of state regulation is the Tribe is critical. It serves to distinquish those cases in which a balancing test has been used to find state law applicable in the absence of Congressional authorization.

This Court should begin its analysis as it did in McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). The state court decision being reviewed in that case was based on essentially the same theories of state jurisdiction as have been proposed here, i.e., states have concurrent jurisdiction on Indian reservations and therefore in the absence of a countervailing tribal self-government interest, state laws may be applied to tribal members. 411 U.S. at 167. Before

deciding whether state jurisdiction was preempted, the Court emphasized that it was "not concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations" and that it was dealing with on-reservation activity by an Indian whose tribe had the "usual accoutrements of tribal self-government." Id. at 167-168. The Court then went on to reaffirm that Navajo treaty provisions setting aside the reservation for Indian use and controlling white entry were sufficient in themselves "to preclude the extension of state law - including state tax law - to Indians on the Navajo Reservation." McClanahan v. Arizona Tax Commission, 411 U.S. at 175.\4 In

4. In regard to the argument that states have "residual" authority over reservation Indians based on principles discussed in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Court noted that that case dealt with non-reservation Indians and that different principles would apply regarding "the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians."
(Continued on next page)

examining subsequent legislation, the Court concluded that "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." Id. at 137.

The provisions in the organic documents providing for the Navajo Reservation and the subsequent legislation discussed in McClanahan are not unique to the Navajos. The Tulalip Tribe has a treaty with similar provisions regarding use and white entry. See, Treaty of Point Elliott, 12 Stat. 927, Washington v. Fishing Vessel Assn., 443 U.S. 658, 663 n. 3 (1979). Although without such treaties, the California tribes were to have a similar status on their reservations. See, e.g. Mission Indian Relief Act, 26 Stat. 712,

(Footnote 4 continued)
411 U.S. at 176 n. 15. See also, Note, The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings LJ 1451, 1459, 1477-1481 (1974).

Sec. 3 (1891) ("for sole use and benefit for band or village").

The subsequent legislation which this Court cited in McClanahan to conclude that Congress had continued its initial preemption of state jurisdiction over tribes was not limited to the area of taxation. Besides legislation on taxation of Indians, the Court noted special Congressional authorization to apply state liquor, health and education laws within Indian reservations. Like state gambling laws, the subject areas covered by other cited statutes are also ones in which states can claim significant interests and potential effects on non-tribal members.\5

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5. The earlier decisions on which McClanahan relied for preemption by treaty involved on reservation commercial transactions that were not restricted to sales between members. See, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 687, 690 (1965); Williams v. Lee, 358 U.S. 217, 221-222 (1959). Those factors did not alter the finding of preemption of state authority as to the tribe or its members.

As was true of the tax statutes, those other federal laws would be "explicable only if Congress assumed that the States lacked the power to impose [their laws] without special authorization." See, McClanahan v. Arizona Tax Commission, 411 U.S. at 177 and n. 16.\6

The result of the preemption analysis in McClanahan was to reaffirm that state laws are not applicable to reservation tribes and their members in the absence of Congressional authorization.

B. A Balancing Test Has Only Been Deemed Sufficient To Allow The Extension Of

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6. The principles applicable to the determination of state taxing authority are not unique to Indian tax disputes but rather are derived from general principles regarding the application of state laws to tribes. See, McClanahan v. Arizona Tax Commission, 411 U.S. at 170-171, quoting from U.S. Dept. of the Interior, Federal Indian Law 845 (1958); Bryan v. Itasca County, 426 U.S. 373, 376 n. 2 (1976).

State Laws To Indian Reservations When The Alleged Illegal Activity Was Committed By A Non-member.

In cases where a balancing test has supported state jurisdiction, the object of state law enforcement was alleged illegal activity by a non-member. See, e.g., Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. at 151 (state taxes whose incidence fell upon non-member purchasers could be applied); White Mountain Apache Tribe v. Bracker, 448 U.S. 148 (1980) (balancing test used to determine enforceability of motor carrier and use fuel tax against non-member log transporters); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) (balancing test used to determine enforceability of state gross receipts tax against non-member builder); New Mexico v. Mescalero Tribe, 462 U.S. 324 (1983) (balancing used to determine applicability of state hunting and fishing regulations to

non-members).

However, while state interests have been balanced against tribal/federal interests where non-members are allegedly violating a state law requirement, the situation is different where the object of enforcement is a tribe or its members. For example, the application of state vendor licensing requirements to a tribal member was analyzed differently from taxes whose incidence was on a non-member purchaser. See, Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) (cigarette sales to non-Indians from off reservation). In spite of arguable state interests, the licensing requirement fell within the traditional immunity of tribes and their members from unauthorized state regulation of their on-reservaton activities, regardless of the commercial nature of the sales, the percentage of off-reservation non-member consumers, the health hazards of cigarettes, etc. In Rice v. Rehner, this

Court assumed that, in spite of the strong state interests and lack of interference with tribal self-government, there would have been a state/federal law enforcement "void" if Congress had not delegated states authority to regulate liquor selling by reservation members. 463 U.S. at 733. In the absence of federal legislation authorizing the application of state law to the tribal member, the state could not restrict the Indian seller.\7

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7. The Court in Rice found concurrent state jurisdiction to prohibit non-members from selling liquor to Indians or introducing it in Indian country. 463 U.S. at 723, n. 10, and Blackman, J. dissenting, 463 U.S. at 740, n. 2. But state regulation of members required Congressional authorization. Rice utilized an examination of respective governmental interests in deciding whether the Congressional delegation of state jurisdiction had to be explicit, as had been contended by Eva Rehner. The Court said:

> The thrust of Rehner's argument, and the primary focus of the Court below, is that state authority in this area is pre-empted because such authority requires an express statement by Congress in light of the canon of construction that we

(Continued on next page)

In both the Colville and Moe cases, the Court was concerned that the Indian's competitive advantage was "dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation."

(Footnote 7 continued)

> quoted in McClanahan, supra: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' "...As we have established above, because of the lack of a tradition of self-government in the area of liquor regulation, it is not neessary that Congress indicate expressly that the State has jurisdiction to regulate the licensing and distribution of alcohol.

Id. at 731 (emphasis added, citations omitted).

The Court employed a balancing test to determine the most likely Congressional intent in the absence of an explicit statement authorizing state jurisdiction. The Court concluded that the statutory language and intent in 18 U.S.C. 1161 was plain. Id. at 730. It did not rule that states may have jurisdiction over reservation Indians even in the absence of federal legislation authorizing such jurisdiction, so long as State interests outweigh federal and tribal interests.

Washington v. Confederated Tribes, 447 U.S. at 151, quoting from Moe v. Salish & Kootenai Tribes, 425 U.S. at 482. That simply is not the situation here. Non-Indian players are not flouting any state legal obligation. The question is not whether tribes are providing an opportunity for non-Indians to evade their legal obligations to the states. The question is whether Congress has authorized states to regulate and enforce their laws against tribes.

II.

PUBLIC LAW 280 PREEMPTS A STATE'S REGULATORY AUTHORITY OVER TRIBAL MEMBERS AND THE ASSERTION OF JURISDICTION OVER TRIBES

A. In The Absence Of Other Legislation Authorizing State Jurisdiction Over A Particular On Reservation Tribal Activity, The Limits Of Public Law 280 Jurisdiction Control.

Congress has spoken on the extent of

permissible state jurisdiction over reservation Indians and Tribes. By passing Pub L 280, Congress authorized certain criminal and civil jurisdiction over reservation Indians. In McClanahan, this Court also ruled that a state could not impose its laws on Indians other than in accordance with that act. 411 U.S. at 177-178. After finding that Congress had preempted state authority over reservation tribes and their members prior to Pub L 280, the Court went on to hold that Pub L 280 now controls any assertion of civil and criminal jurisdiction over reservation Indians.

In McClanahan, Arizona had failed to take the steps necessary to assert jurisdiction under Pub L 280. It conceded that therefore its courts "can exercise neither civil nor criminal jurisdiction over reservation Indians." 411 U.S. at 178. This Court noted that Arizona's

concession was inescapable in light of prior caselaw, and that "the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." Id. at 178 n. 19 and 179. The examples of prior caselaw cited by the Court, U.S. v. Kagama and Kennerly v. Dist. Ct., had made clear that state authority to impose its laws on reservation Indians was preempted and could only be asserted as specifically permitted by Congress. In U.S. v. Kagama, the Court had early defined the relationship between states and Indian tribes, holding that tribes were "thus far not brought under the laws of the Union or of the State within whose limits they resided." 118 U.S. 375, 382 (1886). Before discussing the effect of Pub L 280, the Court in McClanahan, quoted this statement from Kagama, ruling that while federal preemption was the modern test of state authority within reservations, the Kagama holding regarding state authority

over tribes is "nonetheless still true, as it was in the last century." 411 U.S. at 173. In Kennerly v. District Court, the Court had strictly enforced the parameters set by Pub L 280 for assertions of state jurisdiction over tribes, saying that the statute reflected "the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country." 400 U.S. 423, 424 n. 1 (1971).

Thus, this Court has invalidated state assertions of jurisdiction over tribes and their members when not in accordance with Pub L 280. And more recently, this Court again ruled that Pub L 280 controls the extent to which states may impose their laws against Indians, this time in the context of a state attempt at

retrocession.\8 Three Affiliated Tribes v. Wold Engineering, 476 U.S. ____, 90 L.

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8. The earlier ruling in Three Tribes I that Pub L 280 does not preempt the authority of a state court to entertain a suit by an Indian tribe is clearly distinquishable from situations in which states seek to impose their legislative authority upon an Indian tribe. Three Tribes I recognized that Indians have the right to sue, as do other persons. Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984). This principle had long been established before Pub L 280 was passed and has been repeatedly recognized. See, McClanahan v. Arizona Tax Commission, 411 U.S. at 172-173, citing, as an example, Felix v. Patrick, 145 U.S. 317, 332 (1892); Williams v. Lee, 358 U.S. 217, 219-220 (1959) ("suits by Indians against outsiders have been sanctioned). Invoking a court's jurisdiction over other persons to obtain redress for grievances presents a different question from being subjected to court jurisdiction as a defendant, or being subjected to state legislative authority. See, e.g. United States v. Fidelity Guaranty Co., 309 U.S. 506 (1940); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 NDL Rev. 267, 275 (1973) (The Indian right to sue in state courts "certainly does not expand state power to legislate affecting Indians on reservations.") In Three Tribes II, the Court ruled that because of the preemptive effect of Pub L 280 and its 1968 amendments, a state could not refuse to entertain a suit by a tribe because the tribe refused to waive its immunity from state law enforcement.

Ed.2d 881, 890-891, 106 S. Ct. ____ (1986) ("Three Tribes II").

In Three Tribes II, the Court ruled:

> Pub. L. 280...was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation providing for all affected States to come within its terms.
>
> ....
>
> We have previously enforced the procedural requirements and the jurisdictional provisions of Pub. L. 280 quite stringently, consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study...Accordingly, we conclude that since North Dakota's disclaimer is not authorized by (1323(a), it is barred by that section.

Id. (citations omitted).

Numerous state court decisions have rejected arguments of state residual jurisdiction over reservation Indians because Pub L 280 now determines the extent to which states may impose their

laws against reservation Indians. See, Nenna v. Moreno, 132 Ariz. 565, 647 P.2d 1163, 1164, (Ariz. App. 1982), (child support); Malaterre v. Malaterre, 293 N.W. 2d 139, 143-144 (N.D. 1980) (divorce modification regarding child custody); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085, 1087-1088 (1974) (state motor vehicles laws); Martin v. Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972) (paternity suit); Blackwolf v. Dist. Ct., 158 Mont. 493, 523 P.2d 1293 (1972) (delinquency proceedings); Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971) (mortgage foreclosure); State ex rel. Adams v. Superior Ct., 57 Wn.2d 181, 183-184, 356 P.2d 985 (1960) (child dependency). A substantial number of cases have found Pub L 280 preemptive as to state assertions of authority over reservation Indians, while other cases have held that Pub L 280 does not preclude jurisdiction over non-Indians in

Indian country so long as Indians are not affected. F. Cohen, Handbook of Federal Indian Law, 367-368 (1982 ed.) (hereafter, Federal Indian Law).

In her oft cited article, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 543 (1975), Professor Goldberg repeatedly emphasized the preemptive effect of Pub L 280 on questions of state authority over reservation Indians. Id. at 540, 575 n. 183, 593 n. 260.

The preemption test for state jurisdiction on Indian reservations favors exclusive federal control, and looks to the "thrust" of a detailed federal regulatory scheme. Three Tribes II, 90 L. Ed.2d at 890. As held in Bryan v. Itasca County, supra, the thrust of Pub L 280 was to provide limited state jurisdiction for basic law and order problems and the litigation of civil disputes between

private parties, not to permit state regulatory authority over reservation Indians or state legislative control of tribal governments.

Pub L 280 defines the limits of permissible state jurisdiction whether or not a state has accepted the jurisdiction permitted by that statute. If Congress chose not to include jurisdiction over tribes or the application of state civil regulatory laws to Indians when it consented to broader state jurisdiction on reservations, no "anomaly" exists between so-called Pub L 280 states and non Pub L 280 states. State authority to impose its laws against tribes has always required Congressional consent, and in the absence of another federal law granting that jurisdiction, the scope of authority permissible under Pub L 280 controls all states. See, Kennerly v. District Court, 440 U.S. at 424-425 and n. 1 (under Pub L 280, "state assumption of civil

jurisdiction - in situations where Congress had not explicitly extended jurisdiction - was governed by (7). Without assuming Pub L 280 jurisdiction, a "non 280" state simply would not have any civil or criminal jurisdiction over tribes or their members, in the absence of another federal statute permitting such authority. McClanahan v. Arizona Tax Commission, 411 U.S. at 178.

B. The Bryan Distinction As To Regulatory Law Enforcement Under Public Law 280 Is Not Dictum.

This Court's decision in Bryan v. Itasca County, supra, that Pub L 280 did not authorize the application of regulatory laws to reservation Indians is not dictum.

As discussed below, the question of whether Pub L 280 extended state regulatory laws to reservation Indians was a critical issue in Bryan. Even if the lack of intent to authorize that type of

jurisdiction was not the sole basis for the Bryan decision, it was clearly one of the grounds. To call this Court's statements on this point "dictum" is contrary to the well settled interpretation of that term. See, Union P.R. Co. v. Mason City & F.T. D. R. Co., 199 U.S. 159, 165-166 (1905); Six Companies of Cal. v. Joint Highway Dist. No. 13, 311 U.S. 180, 187 (1940); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

In Bryan, the Court found it necessary to determine what Congress intended by the phrase "civil laws...of general application to private persons or private property," contained in (4(a) of Pub. L. 280.\9 The tax at issue was characterized

9. In choosing from the possible meanings of this phrase, the Court undertook a comprehensive review of the statutory langauge, the applicable canons of construction, and the legislative history. Contrary to the suggestion that the Court in Bryan may not have had all the legislative history before it, the opinion separately cites S. Rep. No. 699, 83rd Cong., 1st Sess. (1953), and H. R. Rep.

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as a personal property tax, and therefore, not within the exceptions to state jurisdiction contained in (4(b). See, Bryan v. Itasca County, 426 U.S. at 379 n.

(Footnote 9 continued)
No. 848, 83rd Cong., 1st Sess. (1953), and indicates that it did not simply look to quoted sections in a law review article. Bryan v. Hasca County, 426 U.S. at 380 and n. 5. The Miller letter, relied on by Arizona, Nevada and New Mexico, in their amici brief, was also before the Court. See, Appendix, on Writ of Certiorari to the Supreme Court of Minnesota, in Bryan, supra, which included the June 26, 1953 Miller letter as item "M," Appendix 1, p. 69 (Lewis to Congressman A.L. Miller, Chairman, Committee on Interior and Insular Affairs, House of Representatives, relating to H.R. 1063 [Pub L 83-280], June 26, 1983). The cited language from the reports and the Miller letter is almost verbatim from the statute, and adds no real clarification to its meaning. Id., S. Rep. No. 699, 83rd Cong., 1st Sess. (1953); H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953). The addition of the word "substantive" in these documents to the statutory phrase "civil laws...of general application to private persons or private property" is not inconsistent with the Bryan interpretation. In interpreting the phrase to incorporate only state common law generally applicable to civil disputes between private parties, the Court did not limit the applicable state common law to procedural court rules.

4. Relying on the (4(a) phrase, "civil laws...of general application to private persons or private property," the Minnesota Supreme Court had concluded that "Public Law 280 is a clear grant of the power to tax." Id., at 378.

Construing the intended meaning of the (4(a) phrase from among the various interpretations proposed by the parties was no less critical to this Court's decision in Bryan then was the Court's interpretation of the phrase "in conformity both with the laws of the State...and with an ordinance duly adopted by the tribes," to the decision in Rice v. Rehner, supra.\10

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10. In Bryan, as in Rice, the Court did not assume that the principle requiring express Congressional consent to the extension of state laws necessarily meant that the absence of the words "state jurisdiction," in Rice and the absence of a reference to "tax" in (4(a) of Pub. L. 280 ended the matter. This approach was particularly appropriate in Bryan, where (4(b) did address the application of certain types of taxes and the state court had ruled (4(a) must have been intended to allow other forms of taxation. Moreover,

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The crux of the dispute over the meaning of the (4(a) phrase was whether it encompassed all civil laws, thereby granting plenary criminal and civil jurisdiction to states, or whether it only referred to court rules of decision applicable to disputes between private parties. In order to decide whether state tax laws would be included in the phrase, it was essential to decide which of these meanings was intended. The Court interpreted the phrase to be limited to court rules of decision, characterizing the

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(Footnote 10 continued)
in Rice, an alternative ground for decision was that the "in conformity" language was sufficiently plain to meet a requirement of express Congressional authorization. 463 U.S. at 730. If interpreting the meaning of "civil laws...of general application" in Bryan is dictum because the Court could simply have decided that tax laws must be specifically mentioned in any grant of state jurisdiction, then all of Rice's discussion of state interests and tribal sovereignty to establish that an express grant of state liquor jurisdiction was unnecessary, must also be treated as dictum.

excluded body of law enacted by state legislatures as "civil regulatory."

The state court opinion reviewed in Bryan, and the parties' briefs, make it clear that the proper characterization of laws applicable under the (4(a) phrase was the heart of the dispute. The Minnesota Supreme Court's opinion was grounded upon its conclusion that Pub L 280 had worked a radical change in the prior legal status of reservation Indians vis a vis the states, and that by granting states plenary civil and criminal jurisdiction, Congress necessarily granted taxing power not specifically excluded. Opinion of the Supreme Court of Minnesota, Appendix on Writ of Certiorari to the Supreme Court of Minnesota, p. 36.

The Minnesota Supreme Court started with the fundamental premise discussed in (I of this brief, which was well established at the time Pub. L. 280 was

passed. It quoted from a 1944 Minnesota Supreme Court decision:

> [B]ut, it is uniformly held that, absent a treaty or federal statute conferring it, a state's jurisdiction does not extend over the individual members of an Indian tribe maintaining their tribal relations and organization upon a reservation within the geographic limits of the state.

Opinion, p. 40 (quoting from State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944).

Summarizing "the current status of the law set forth in the McClanahan and Mescalero," the state supreme court in Bryan said:

> (2) Congress has plenary jurisdiction over reservation Indians. That jurisdiction may be ceded to the state's only by express grants of jurisdiction. In absence of such grants, no state power exists.

Opinion, p. 39.

The state court then went on to conclude that the legislative history, language, and structure of Pub L 280 supported finding an express grant. In doing so, it relied heavily upon Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 (D. Neb. 1974), in which the federal district court for the District of Nebraska had ruled that in (4(a) Congress expressly subjected Indians to all state laws of general application and therefore tax laws were necessarily applicable, except as specifically excluded. Opinion, Bryan Appendix, pp. 44-45, 47.

In this Court, in Bryan, the parties argued the possible alternative interpretations of the (4(a) phrase. For example, the respondent County argued:

> ...There are only two jurisdictional sections, one for civil and one for criminal jurisdiction. If Congress had conceived a third class of laws encompassing state tax laws, land use regulations, water laws and

other general non criminal laws, and had considered that these laws were enforced by a judicial proceeding which is neither criminal nor civil, it is likely that it would have dealt with that class in a third section or have wholly excepted that class from the operation of both the civil and criminal sections. However, it took neither of these approaches. Instead it merely subjected the broad grants of jurisdiction to limited exceptions in favor of trust and restricted property.

Brief for the Respondent, pp. 8-9.

In its brief, the petitioner argued:

So Congress in Public Law 280 allowed Indians to go to state courts and provided them with a ready-made body of state law to look to in resolving their private civil disputes. Congress intended "civil laws...of general application" to mean those laws which have to do with private rights and status. Therefore, "civil laws...of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent and similar matters, but would not include laws declaring or implementing the states' sovereign powers, such as the unique power to raise revenue. The latter are not within the normal meaning of "private" laws.

A comparison of the Public Law 280

> language with that used in the termination acts again reveals the limited nature of Congress' grant in the former statute. Thus, while Congress made all state laws applicable to both tribes and their members in the termination acts, in Public Law 280 it authorized state jurisdiction only over those civil causes of action affecting private persons or private property on Indian reservations. Tribes were conspicuously left out of the conferral of jurisdiction in section (a) although included in sections (b) and (c). This is not surprising since it would have been wholly inappropriate to have tribes resolve their disputes in state courts. Indeed, in 1966, thirteen years after Public Law 280, Congress enacted 28 U.S.C. {1362 which provided special federal court jurisdiction for tribal controversies.

The issue in Bryan was whether Public Law 280 excluded a vast body of state laws which cannot easily be characterized as either civil or criminal and are generally referred to as regulatory. The Court in Bryan expressly adopted the Petitioner's interpretation of the disputed statutory language. 426 U.S. at 383-385, 389-390, and n. 10-11.

At the time Bryan was decided, this critical question regarding the scope of Pub L 280 authority had received substantial attention. The Court realized that the answer would not only be important to disputes over taxation, but also to disputes over other regulatory assertions of state jurisdiction. See, e.g., Santa Rosa Band of Mission Indians v. Kings County, supra (holding that Public Law 280 was not intended to extend state regulatory laws to reservation Indians and that local land use requirements are inapplicable); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N.D.L. Rev. 267 (1973); Note, The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings LJ 1451 (1974), all of which were cited in Bryan.

The Court in Bryan did not simply make

a single, offhand reference to the regulatory issue. It identified the lack of intent to grant such regulatory authority as a basic premise of its decision, at least four different times. Bryan v. Itasca County, 426 at 384, 387, 388 and n. 14. It explained the distinction it was drawing between state court common law and state legislation implementing the State's general police powers, adopting petitioner's interpretation and that proposed in a comprehensive law review article on the subject. Bryan v. Itasca County, 426 U.S. at 383-384, n. 10.

Since Bryan was decided, it has been consistently interpreted to preclude state regulatory jurisdiction under Pub. L. 280. See, Federal Indian Law, 363-365; Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479, 522 (1979). Federal administrative policies and programs have been fashioned around the

no regulatory jurisdiction principle. For example, EPA works directly with tribes even in "280 states" to implement federal environmental laws, rather than approving State implementation on Indian lands. EPA general counsel have consistently interpretated such State regulatory authority to be outside the scope of Pub L 280, in light of well-established Indian law principles, the statutory language and legislative history, and the Bryan decision. See, EPA General Counsel Opinion, No. 76-28A (December 8, 1976); EPA General Counsel Opinion, No. 76-30 (December 8, 1976); EPA General Counsel Opinion, No. 77-6 (May 31, 1977). See also, Will, Indian Lands Environment - Who Should Protect It?, 18 Nat. Res. J. 465, 487-491 (1978). EPA has established federal environmental law implementation programs for Indian reservations which take into account the unique jurisdictional

considerations there, and federal policies to promote tribal self-government and economic development. Its jurisdictional and policy rationale for refusing to approve state implementation programs as to Indian lands has been upheld in court challenges. Nance v. EPA, 645 F.2d 701 (9th Cir.), cert. denied sub. nomin; Crow Tribe of Indians v. EPA, 102 S. Ct. 635 (1981); State of Wash., Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985). Congress has followed the EPA approach by enacting statutory provisions expressly allowing EPA to treat tribal governments like states for purposes of implementing federal environmental laws on their reservations. See, e.g., Nance v. EPA, 645 F.2d at 714; (regarding 1977 Clean Air Act amendments); Safe Drinking Water Act Amendments of 1986, Pub L 99-339, Sec. 302.

In Washington State, the King County Health Department has established a special health law enforcement program for the

Muckleshoot Indian Reservation. This cooperative county/tribal program reflects the common understanding that the state lacks regulatory jurisdiction over the tribe and its members. In recently analyzing the program's different treatment of non-Indian fee land owners on the Reservation, the Washington Court of Appeals reaffirmed the principles applicable here: 1) Pub L 280 did not authorize state regulatory authority over the tribe or its members; and 2) Rice v. Rehner did not eliminate the requirement for Congressional authorization for jurisdiction over reservation Indians. Thomsen v. King County, 39 Wn. App. 505, 508-510, 694 P.2d 40 (1985).

In 1977, a year after Bryan was decided, the California Attorney General's Office appeared to have no dispute with the widely accepted interpretation of Bryan as precluding state regulatory

authority under Pub L 280. In that year, it received a request for an opinion on whether the state had jurisdiction over open burning by the Quechan Tribe on its reservation, in light of Bryan. The California Attorney General Opinion concluded the State did not have such jurisdiction. It explained in detail the principles reflected in Bryan, agreeing that "Congress has only sparingly consented to the assumption of State jurisdiction over the activities of reservation Indians," and concluding that "if such authority exists it must derive in the first instance from a congressional grant of authority. Further, the only possible source of such a grant is the Clean Air Act." California Attorney General Opinion No. 50 77/10 I.L., pp. 4,7. As to the Clean Air Act, the Opinion states:

> These considerations tend to show that in enacting Section 118, the Congress did not take Indian tribes

> into account at all. Certainly there is no evidence of the intent necessary to subject Indians and tribes to state and local standards and limitations.

Id. at 10.

The federal district courts who have applied the no regulatory jurisdiction rule have commonly found the types of laws at issue in this case to be regulatory, and therefore, inapplicable.

C. The Regulatory/Prohibitory Distinction Is A Concept This Court Recognized Long Before Bryan. Its Rejection Has Implications For Federal Reservations Other Than Indian Reservations.

The states' arguments in this case regarding the scope of Pub L 280 authority amounts to the same argument made and rejected in Bryan, i.e. Pub. L. 280 authorized plenary state jurisdiction over reservation Indians. In arguing against the civil regulatory/prohibitory law distinction, Arizona, Nevada, and Mexico

explain why plenary state jurisdiction is the logical outcome of the states' position.

> ...any collection of State laws which, in the aggregate, forms a regulatory scheme which is civil in its general nature must by definition also include penal or prohibitory enforcement components. Otherwise, the State's regulatory objectives and policies will be rendered completely illusory and unattainable.
>
> Thus, even assuming the propriety of the questionable hypothesis that, under Pub. L. 280 and related similar laws (e.g. 18 U.S.C. (13, the "Assimilative Crimes Act," applicable in non-Pub. L. 280 states) Congress intended to include only a State's exclusively "criminal/prohibitory" laws, the inclusion of the penal or prohibitory enforcement components of systems otherwise characterized as "civil/regulatory" seems clearly to be intended.

Brief of the States of Arizona, Nevada and New Mexico, As Amici Curiae In Support of the State of California, p. 12.

Long before Bryan, in a case involving one of these "related similar laws," the

Court pointed out the need to draw a distinction between common law type crimes and activities which state legislatures have closely regulated through licensing and similar restrictions enforceable by criminal penalties. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 389 n. 8 (1944). In Johnson, the Court considered whether the Assimilative Crimes Act might permit enforcement of state liquor laws on a military reservation. Although Johnson did not decide the issue, what is important about the Johnson statement is the concept it represents. When dealing with a federally established reservation that has traditionally been subject to exclusive federal jurisdiction, the Court must not assume that legislation such as the Assimilative Crimes Act and Pub L 280 was intended to result in the wholesale application of state laws. As noted in Johnson, in the absence of clear language authorizing state regulatory authority and

evidence that Congress considered the matter, a Court should not assume that Congress intended to alter so drastically a reservation's unique federal status. Furthermore, Johnson pointed out that the applicability of a particular state statute under federal statutes such as the Assimilative Crimes Act is a federal question, upon which the interpretation of state courts is not binding. 321 U.S. at 383.

In Bryan, this Court found a total absence in Pub L 280's legislative history of Congressional discussion of state civil regulatory authority, or jurisdiction over tribes. 426 U.S. at 389. Subsequent legislative history indicated a Congressional assumption that Pub L 280 had not altered jurisdiction as to regulatory laws with criminal penalties, e.g. state environmental laws. See, Bryan v. Itasca County, 426 U.S. at 386-387. The same sort

of assertions made by the states today about the intent of Pub L 280 and the possibility of undesirable and unregulated reservation businesses, in the absence of state jurisdiction, were answered by Senator Ervin, who offered and principally sponsored the 1968 Pub. L. 280 amendments. Id. at 387. Particularly in the context of regulating tribal activity on an Indian reservation by direct state enforcement of state laws, this caution is appropriate. In deciding that Pub L 280 was not intended to alter tribal government immunity from state control and the immunity of reservation Indians from state civil regulatory authority, the Court said that a contrary conclusion would mean that Pub. L. 280 was a termination act. Id., at 389-390. Concerns such as this led this Court to reject similar state arguments for plenary jurisdiction over reservation Indians selling cigarettes to non-Indians based on the General Allotment Act's

provision regarding state criminal and civil jurisdiction. See, Moe v. Salish and Kootenai Tribes, 425 U.S. at 477-479.

CONCLUSION

No act of Congress has authorized the state jurisdiction asserted here. Federal common law has not recognized such authority, and Pub L 280 now defines the limits of state jurisdiction over reservation Indians and tribes.

Whether courts characterize the test for permissible state jurisdiction under Pub L 280 as a civil regulatory/prohibitory distinction, or a public policy test, the essential concept has been thoroughly litigated and decided in Bryan. Congress granted states criminal jurisdiction to deal with basic law and order problems on Indian reservations. In addition, state courts could apply their common law rules of decision to private disputes, such as

contract matters, torts, and the like. However, the body of state regulatory law that may or may not contain criminal penalties, was not made applicable.

The running of bingo and card room games for what are essentially charitable, governmental purposes simply does not fall within the type of law and order concerns that were the motivating force behind Public Law 280. Moreover, Public Law 280 did not extend any state jurisdiction over tribes. Until Congress decides otherwise, tribal games are not subject to state law enforcement. It is for Congress, not the Court, to decide whether the omission of the state laws at issue here from Pub L 280 jurisdiction requires re-examination and whether there should be a change in the law.

Allen H. Sanders
Attorneys for Tulalip Tribes of Washington, Soboba Band of Mission Indians, LaJolla Band of Mission Indians, and the Trinidad Rancheria

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, by and through the WASHINGTON STATE GAMBLING COMMISSION, Plaintiff, v. CLARENCE HATCH, et al., Defendants.	)	NO. C83-1518R ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on a motion by defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Having reviewed the memoranda and other materials submitted by counsel, together with the relevant record and files herein, the court finds and rules as follows:

In this action for declaratory relief,

the Washington State Gambling Commission (the Commission) seeks a determination that Washington law pertaining to the operation of bingo games and pulltab chances may be enforced against the on-reservation activities of the Tulalip Indian Tribe (the Tribe). Defendants, seventeen employees of the Tulalip Entertainment Center, have moved for summary judgment claiming that the suit is barred by tribal sovereign immunity and that Public Law 280\1 does not provide the Commission a cause of action.

Viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the non-moving party, this court has determined that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. Barona Group of Capitan

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1. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (commonly known as "Public Law 280").

Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1187 (9th Cir. 1982), cert. denied, 103 S.Ct. 2091 (1983).

I. FACTS

The Tulalip Tribes of Washington is an independent Indian Nation recognized by federal executive order with its reservation in the County of Snohomish. On February 6, 1982,\2 the Tulalip Board of Directors, the Tribe's governing body, enacted a Tribal Ordinance authorizing, with certain restrictions, the playing of bingo, punchboard and pulltab games within the reservation. The stated purpose of the ordinance was to promote economic development on the reservation and to raise funds for tribal social services and other governmental programs. Only the Tribal

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2. The Tulalip Ordinance was amended by the Tribe's Board of Directors on June 4, 1983. Exhibit 2, Attached to Defendants' Motion for Summary Judgment.

government, acting through the Tulalip Bingo Commission, may operate the games and all profits must go to the Tribe. The ordinance was reviewed and approved by the Secretary of the Interior.

According to the Tribe, the Tulalip Entertainment Center cost approximately $2,000,000 to construct. Since the opening of its gaming operation in June 1983, the Tribe has attracted a large number of players to its reservation for an opportunity gamble for prizes. The parties do not dispute the proceeds from the bingo and pulltab games contribute a vital share of the revenues of the Tribe.

The Commission brought an action in state court seeking a determination as to whether Public Law 280 authorized it to apply state laws to the Tulalip Tribe's on-reservation gambling activities. The defendants are seventeen individuals who are, or were at one time, allegedly involved in the management or supervision

of the gaming operation at the Tulalip Entertainment Center. The Tribe itself was not named as a defendant. The defendants removed the case to this court pursuant to 28 U.S.C. (1441.

II. DISCUSSION

The Tribe's gaming operation is clearly in violation of Washington law in several respects. First, RCW 9.46.020(2) permits the operation of a bingo hall by a qualified organization no more than three days per week. The Tribe's Entertainment Center is in operation seven days a week. Also, the Tribe is not a qualified organization as that term is defined by statute. RCW 9.46.020(3). Second, RCW 9.46.110 limits the value at which pulltabs may be sold to 25 cents per chance. Pulltabs are sold at the Tulalip Entertainment Center for 25 cents, 50 cents and one dollar.

Defendants contend that they need not comply with the above statutory provisions because of the Tribe's sovereign immunity to enforcement of state laws, and because of the Tribe's right to self-government. Defendants also argue that Public Law 280 does not confer jurisdiction on the State of Washington to enforce its bingo and pulltab laws on the Tulalip Reservation because these laws are "civil/regulatory" in nature, and thus do not fall within the Act's grant of criminal jurisdiction. The court turns first to the issues raised by Public Law 280.

The traditional rule is that states lack jurisdiction over Indian reservation activity, absent the consent of Congress. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In 1953, Congress delegated to the states some of its power to regulate affairs on Indian reservations by passing

Public Law 280. Sections 2 and 4 of Public Law 280\3 granted certain states the right to exercise criminal jurisdiction and limited civil jurisdiction over the Indian tribes. Section 7 of the Act\4 granted other states, such as Washington, the right to assume criminal and civil jurisdiction by legislative enactment. Pursuant to section 7, Washington assumed jurisdiction over reservation Indians in RCW ch. 37.12. See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). By this enactment, and with the consent of the Tribe,

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3. Codified at 18 U.S.C. (1162 and 28 U.S.C. (1360 respectively.

4. 67 Stat. 590 (1953) (repealed by Pub L. 90-284, Title IV, (403, 82 Stat. 79 (1968). Although section 7 of Public Law 280 was repealed in 1968 by section 403(b) of Public Law 284, any cessions of jurisdiction made pursuant to the Act prior to its repeal were not affected. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 313 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

Washington assumed jurisdiction over the Tulalip Indians to the full extent allowed by law.\5

In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court construed section 4 of Public Law 280 to mean that states have jurisdiction only over private civil litigation involving Indians in state court. Under Itasca County, Washington is without authority to impose its civil/regulatory laws on the Tulalip Indian Reservation. Washington does, however,

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5. It should be noted that as to acts committed by Indians on Indian land, Washington took jurisdiction only over eight specific subject areas--chiefly welfare, family law and motor vehicles--but not gambling. Consequently, apart from those enumerated areas, Washington courts do not have jurisdiction over crimes committed by Indians within their reservations, unless the affected tribe has requested the state to assume jurisdiction. United States v. Farris, 624 F.2d 890, 895 (9th Cir. 1980). The Tulalip Tribe elected, by ordinance, to subject itself and its reservations to the civil and criminal jurisdiction of the State of Washington. Such jurisdiction became effective in 1958 and has not been retroceded.

have full criminal jurisdiction over offenses committed by the Tulalips on their reservation.\6 Thus, whether Washington's laws apply to the Tribe's bingo and pulltab gaming operation depends on whether the laws are classified as civil/regulatory or criminal/prohibitory in nature.

The Ninth Circuit addressed this question in Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 103 S.Ct. 2091 (1983). In that case, the Barona Group of Indians filed suit in federal court requesting declaratory and injunctive relief from the enforcement against them of certain California county and state laws pertaining to the operation of bingo games on the reservation. There, as in Washington, the state statute exempted bingo operations conducted by

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6. See supra note 5 and accompanying text.

certain charitable and nonprofit organizations under certain conditions from a general prohibition of gambling. Compare Cal. Penal Code (326.5(a) with RCW 9.46.020(3) and 9.46.030. The Ninth Circuit determined that whether a statute should be classified as regulatory or prohibitory depended on whether the activity complained of was against the public policy of the state. Evaluating the statute, the court determined that the California legislature intended to regulate rather than prohibit bingo. The court based this determination on the fact that bingo is allowed in California as a form of recreation, that certain charitable and nonprofit organizations are allowed to benefit by raising revenue from bingo and that the state regulates bingo halls only to prevent the game of bingo from becoming a money-making venture. Id. at 1189.

In interpreting Public Law 280, the

Barona court also recognized several important rules of construction applicable to statutes affecting Indian affairs. First, ambiguities in statutes concerning dependent tribes are to be liberally construed and resolved in favor of the Indians. Second, a finding of state jurisdiction over reservations is, historically, strongly disfavored. Third, well-established federal policies encourage tribal self-government and promote tribal economic development.

This court now considers whether the Washington statute is prohibitory or regulatory in nature. RCW 9.46.030 makes an exception for bingo and pulltabs from a general constitutional prohibition on lotteries. See Wash. Const. amend. 56. The exception applies to a variety of charitable and nonprofit organizations, RCW 9.46.020(3), but only to the extent that the games are conducted within narrowly defined conditions and restrictions. These

conditions and restrictions are consistent with the public policy of Washington, enunciated in RCW 9.46.010, to permit limited forms of gambling for fund raising purposes or for social pastimes. At the same time it was the clear intent of the legislature to restrain persons from seeking profit from professional gambling acts in the state and to restrain persons from patronizing professional gambling activities. Id.

The essence of the Commission's argument is that since the bingo games and pulltab changes are not conducted in compliance with the provisions of RCW 9.46.020(2) and 9.46.110, the gaming operators, defendants here, are conducting an illegal gambling enterprise and therefore subject to criminal prosecution under RCW 9.46.220. Thus, the Commission argues, the defendants' refusal to comply with the above statutory provisions

dictates a prohibitory classification for Washington's bingo and pulltab laws. This same argument was made and rejected in Barona and in two other cases with facts almost identical to the instant case. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), aff'g, 491 F. Supp. 1015 (S.D. Fla. 1980); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981). See Barona, 694 F.2d at 1189-90.

In Seminole, the Fifth Circuit concluded that Florida's bingo laws could not be applied to regulate bingo on the Seminole Reservation located within the state of Florida. Like Washington's laws governing the conduct of bingo, the Florida statute limits the conduct of bingo to certain defined organizations and regulates the conduct and frequency of games. Also, as in Washington,the Florida statute had removed the operation of bingo games from the general constitutional prohibition on

lotteries, but continued to denounce the evils of professional gambling. Seminole, 658 F.2d at 314, 316.

In addition, violators of the Florida bingo statute were subject to criminal prosecution. The court recognized, however, that while the inclusion of penal sanctions made it tempting to classify the statute as prohibitory, the Florida statute could not automatically be classified as such. "A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one." Seminole, 658 F.2d at 314. Instead, an analysis of the state's public policy was required in order to determine whether the statute was regulatory or prohibitory.\7 After reviewing the

7. In holding that the bingo statute was regulatory, the court in Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), relied on the "public policy" test developed in two Ninth Circuit cases, United States v. Marcyes, 557 F.2d

(Continued on next page)

statute, the court concluded that bingo fell in the category of gambling that the legislature has chosen to regulate by imposing certain limitations to avoid abuses. Id. Accordingly, the Seminole Indian Tribe was not subject to the

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(Footnote 7 continued)
1361 (9th Cir. 1977), and United States v. Farris, 624 F.2d 890 (9th Cir. 1980). In Marcyes, the court held that the Washington fireworks law was prohibitory and not regulatory. Evaluating the statute, the court found that the "purpose of the fireworks laws [was] not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens." 557 F.2d at 1365. Marcyes was distinguished in Seminole on the basis that the Marcyes court had found the possession of dangerous fireworks generally prohibited and not merely licensed. Seminole, 658 F.2d at 315.

Farris dealt with a Las Vegas-type casino operation on the Puyallup Reservation. The court found that the "violation of the law of state" requirement of section 1955 of the Organized Crime Control Act, 18 U.S.C. (1955, was intended to include in the federal prohibition those gambling operations contrary to state public policy as was the Puyallup gambling. 624 F.2d at 895-96. Based on this analysis, the Seminole court concluded that the state's public policy determines whether the activity is prohibited or regulated. 658 F.2d at 316.

regulations and could not be prosecuted for violating the limitations imposed. See also Oneida, 518 F. Supp. at 719 (general populace allowed to play bingo at will).

Applying the test set forth in Barona, 694 F.2d at 1189-90, this court concludes that Washington's bingo and pulltab laws are regulatory and of a civil nature. First, RCW 9.46.030 authorizes bingo and pulltab operations by a wide variety of charitable and nonprofit organizations. See RCW 9.46.020(3). There is no general prohibition against playing bingo or pulltabs. Compare United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). The Washington statute regulates bingo as a money making venture by limiting the location and number of days of operation, requiring that all proceeds be applied to the organization conducting the game and prohibiting the use of professional managers other than members or employees of

the organization. RCW 9.46.020(2). Pulltabs are regulated by limiting the price at which they may be sold. RCW 9.46.110. As in Barona and Seminole, the fact that so many diverse organizations are allowed to conduct gaming operations, even though under strict regulation, is contrary to a finding that such operations violate Washington public policy. 694 F.2d at 1189; 658 F.2d at 314.

Second, as in the other cases, the general populace of the State of Washington is allowed to play bingo and pulltabs.

Third, the Barona court in interpreting Public Law 180 stated that ambiguities in statutes concerning dependent tribes are to be resolved in favor of Indian sovereignty. 694 F.2d at 1190.

Finally, the stated purpose of the Tulalip gambling ordinance is to raise funds for the promotion of charitable and

nonprofit organizations and tribal governmental and social programs. The affidavits of defendants Hatch and Williams establish that the profits received by the Tribe from the bingo and pulltab activities are to be invested for the betterment of the Indian community. See Affidavits of Clarence Hatch and Wayne Williams. As was emphasized in Barona, "this intent to better the Indian community is as worthy as the other charitable purposes to which Bingo [and pulltab] proceeds are lawfully authorized under the [Washington] statute. 694 F.2d at 1190. Thus, while the Tulalip Tribe may not qualify as a charitable organization within the letter of the Washington gambling statute and the Tribe's gaming operation does not fully comply with all requirements of the statutory scheme, the Tulalip Tribe can be said to fall within the spirit of the statute's permissive intent.

In a supplemental memorandum, the

Commission also urged that this court permit the application of the state's bingo and pulltab regulations to the Tulalip gaming operation on the ground that state public policy prohibits the concentration of profits from bingo games in the hands of only a few operators. Even if it is true that the on-reservation activities of the Tribe have an impact on competing games operated by non-Indians off the reservation, this is not sufficient to convert the state's regulation into one which should be classified as prohibitory. Public Law 280 does not authorize the states to regulate tribal affairs merely because of a desire to equalize the distribution of funds among competing charitable and nonprofit organizations.

The court finds the Commission's other argument to be without merit. For all of the foregoing reasons, defendants' motion for summary judgment is GRANTED. This

action is hereby DISMISSED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 13th day of August, 1984.

/s/

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

(21)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-1708

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CALIFORNIA ET AL.,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, ET AL.,
Appellees.

On Appeal from the United States Court
of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF

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MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, appellees Cabazon and Morongo Bands of Mission Indians hereby move this Honorable Court for leave to file the accompanying Post-Argument Brief.

The purpose of the Post-Argument Brief is to correct a misstatement of fact made by counsel for the appellants in rebuttal during oral argument of this case on December 9, 1986. The statement relates to a significant issue and is directly contrary to the stipulated facts in the case. Because it was made in rebuttal, counsel for the appellees had no opportunity to respond during oral argument.

The Post-Argument Brief also corrects a typographical error in Appellees' Brief with respect to the citation of a relevant federal statute.

For the foregoing reasons, appellees respectfully move this Court for leave to file the accompanying Post-Argument Brief.

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POST-ARGUMENT BRIEF

During oral argument of this case on December 9, 1986, counsel for the appellants made a factual statement during his rebuttal that was contrary to the stipulated facts in this case. Because this misstatement relates to an important issue, and because it was made during rebuttal and could not, therefore, be challenged during oral argument, the purpose of this Post-Argument Brief is to correct this misstatement. In addition, this Post-Argument Brief corrects a typographical error in Appellees' Brief with respect to the citation of a relevant federal statute.

During rebuttal, counsel for the appellants stated that the Cabazon and Morongo Bands of Mission Indians would qualify as organizations authorized to sponsor bingo games under California law. However, the stipulated facts in this case clearly state that the appellee tribes are "not among the enumerated entities authorized to operate bingo games" under California law. Joint Appendix 64-65, paragraph 24; 82-83, paragraph 15.

In addition, the citation to 18 U.S.C. § 483 at page 30 of Appellees' Brief was a typographical error. The

correct citation should have been 18 U.S.C. § 438, which makes the violation of 25 U.S.C. § 81 a federal criminal offense.

Respectfully Submitted,

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MOTION FILED
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MOTION FOR LEAVE TO FILE RESPONSE TO POST-ARGUMENT BRIEF

If the Supreme Court grants the appellees' motion to file post-argument brief, it is respectfully requested that

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